IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

Action No. 9703 18343

Between:

NAZMIN NURANI and ZEINI VIRJI-NURANI

Applicants

- and -

ENVIRONMENTAL APPEAL BOARD

Respondent

- and -

338802 ALBERTA LTD., operating as MILLWOODS & STRATHCONA BOTTLE DEPOTS, 425167 ALBERTA LTD., operating as BOTTLE BIN & BOTTLE DEPOT, ALBERTA BOTTLE DEPOT ASSOCIATION and DIRECTOR OF CHEMICAL ASSESSMENT AND MANAGEMENT DIVISION OF ALBERTA ENVIRONMENTAL PROTECTION

Intervenors

Reasons for Judgment of the Honourable
Mr. Justice Tellex W. Gallant

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[1] Applicants applied, under the provisions of the *Environmental Protection and Enhancement Act*, S.A. 1992 c. E-13.3 (the "Act") to the Director of Chemical Assessment and Management Division of Alberta Environmental Protection (the "Director") for approval to operate a Universal Beverage Container Depot at a specified location in the city of Edmonton. On June 27, 1997, the Director refused the application.

[2] For ease of reference, Part 3 of the Act, comprising ss. 83 to 95 thereof, inclusive, are annexed hereto as Appendix I.

[3] On July 7, 1997, the Applicants appealed the refusal to the Environmental Appeal Board (the "Board") by submitting a notice of objection pursuant to the provisions of s. 84(1)(b) of the Act.

[4] Section 86(1) of the Act provides that on receipt of a notice of objection the Board shall conduct a hearing of the appeal. Section 87(6) provides that the Board "...shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations." Section 87(8) provides that the Board may establish its own rules and procedures for dealing with matters before it, subject to the regulations. Counsel did not provide me with regulations and therefore I assume that they are irrelevant to the matter before me.

[5] On August 19, 1997, the Board held a hearing of the appeal in the matter. No notice of the intended hearing was sent to any of the Intervenors (when I use the term "Intervenors" herein, I mean the ones described in the style of cause except for the Director).

[6] Section 91(1) provides that on completion of its hearing of the appeal, the Board shall submit a report to the Minister, including, *inter alia,* its recommendations.

[7] On August 22, 1997, the Board, pursuant to the provisions of s. 91(1) of the Act, forwarded its report and recommendations (the "Report and Recommendations") to the Minister of Environmental Protection (the "Minister"), recommending that the Applicants' appeal be allowed.

[8] Pursuant to s. 92, the Minister may by order, *inter alia*, confirm the Board's decision and shall give notice of his decision to the Board. The Board is then required to give notice of the decision to all persons who submitted notices of objection or made representations or written submissions to the Board and to all other persons who the Board considers should receive notice of the decision.

[9] On September 2, 1997, the Minister made an order pursuant to s. 92(1) of the Act confirming the Report and Recommendations and ordering that they be implemented. Thereupon the Minister gave notice of his decision to the Board and the Board gave notice of the approved Report and Recommendations and the Ministerial Order on September 3, 1997 to the Applicants and to their representatives pursuant to s. 92(2), and to Alberta Justice.

[10] Between September 10 and September 26, 1997 the Intervenors, claiming an interest in the proceedings, applied to the Board to have the Board reconsider its Report and Recommendations pursuant to s. 92.1 of the Act. As the basis for the requested reconsideration, they alleged inadequacy of notice given to them for the Board's prior hearing.

[11] Section 92.1 provides:

> "Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it."

[12] Section 90(3) provides, in part, that the Board may reverse or vary a decision made by the Director in relation to a matter under ss. 84(1)(k) (where the Director requires a person to pay an administrative fee) or 84(1)(l) (where the Director refuses a request for confidentiality) which has been appealed, neither of which matters were before the Board in this case. There is no provision in the Act requiring the Board to give any report or recommendation to the Minister with respect to the hearing by the Board in relation to hearings resulting from a notice of objection relating to s. 84(1)(k) or (l).

[13] Section 91(1) is a counterpart to s. 90(1), but deals with notices of objection referred to in ss. 84(1)(a) to (j). As I stated, the notice of objection that was submitted by the Applicants in this case was pursuant to s. 84(1)(b) "where the Director refuses... to issue an approval..."

[14] On September 23, 1997, the Applicants filed copies of the Board's Report and Recommendations and the Minister's approval in the Court of Queen's Bench pursuant to s. 93.1 of the Act, with a certificate attached noting the requests for reconsideration.

[15] Under the provisions of s. 93.1, when a decision of the Minister under s. 92 is filed with the Clerk of the Court of Queen's Bench it is enforceable as if it were a judgment of that Court.

[16] On September 26, 1997, the Board advised that it would hold a hearing on October 6, 1997 to determine whether it should reconsider its decision and, if so, to hold a new hearing in the matter. It is my understanding that the latter hearing has been postponed pending the release of these Reasons.

[17] On October 3, 1997, the Director of Action on Waste issued an approval to the Applicants pursuant to the Minister's confirmation of the Report and Recommendation from the Board.

[18] The Applicants filed an Originating Notice of Motion in this matter on September 29, 1997, requesting an Order:

(a) prohibiting the Board from conducting a hearing to hear oral submissions from all parties currently involved as to whether or not the Board should decide whether to reconsider its Report and Recommendations based on supplementary evidence supplied by the parties currently involved in the matter; and

(b) prohibiting the Board from hearing the merits of the submissions from the Intervenors; and

(c) declaring that the Board does not have jurisdiction to consider the two prior issues.

[19] Applicants take the position that the Board does not have jurisdiction to reconsider its decision in that the Board is *functus officio* in that regard.

[20] The issues that the parties wish the Court to decide are as follows:

(a) Does the Board have jurisdiction under the Act to entertain an application for reconsideration under s. 92.1 in these circumstances, or is it *functus officio*?

(b) If the Board is *functus officio*, is it because:

(i) the Minister has approved the Board's decision and his approval is irrevocable;

(ii) the Minister has approved the Board's decision and has neither asked nor ordered that they be reconsidered nor has he revoked his consent; or

(iii) the Order has been filed in the Court of Queen's Bench;

(iv) an approval has since been issued by the Director of Action on Waste.

[21] If it is determined that the Board is not *functus officio*, the issues under (b) above need not be addressed.

[22] Section 92.2 is a privative clause as follows:

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

Does the Board have jurisdiction to reconsider its decision made under s.91(1) after the Minister issues the Ministerial Order under s. 92 confirming the Board's Report and Recommendations, and after a decision of the Board or of the Minister is filed with the Clerk of the Court of Queen's Bench pursuant to s. 93.1?

[23] The Applicants argue that the Board has no such jurisdiction. They point out that the appeal to the Board in the matter before the Court was initiated pursuant to s. 84(1)(b) wherein the Appellants appealed the Director's refusal to grant them an approval to operate a Universal Beverage Container Depot. They argue that s. 90 of the Act provides for the procedure and jurisdiction of the Board with respect to notices of objection submitted under s. 84(1)(k) or (l) only; that with respect thereto the Board is to issue a written decision and there is no provision for appeal therefrom. The rendering of the Board's decision is the final step.

[24] Section 91 provides for the procedure and jurisdiction of the Board with respect to notices of objection referred to in s. 84(1)(a) to (j). Under s. 91, after the filing of a notice of objection, the Board does not make a decision but rather is to submit its Report and Recommendations to the Minister within 30 days after the completion of the hearing of the appeal.

[25] Applicants argue that s. 92.1, permitting the Board to reconsider any decision, report or recommendation made by it, must be interpreted as follows:

(a) as it relates to s. 90, the Board may vary its decision referred to therein, subject to the principles of natural justice; and

(b) as it relates to s. 91, the Board can only reconsider and vary its report and recommendation if the Minister has not confirmed it by order under s. 92 or, in any event, at least prior to the time that the Minister's decision is filed with the Clerk of the Court of Queen's Bench under s. 93.1 because in either such event the Board has become *functus*.

[26] The Applicants argue that there is no provision in the Act permitting the Minister to reconsider or alter a Ministerial Order made by him under s. 92; that therefore the Minister is *functus* with respect to any issue contained in the Board's Report and Recommendations from the time that the Minister makes his order with respect thereto under s. 92 and thereupon has no further jurisdiction with respect to the appeal that had been made to the Board; that if the Minister could not make an order under s. 92 to vary his prior order, then it would be an exercise in futility to permit the Board to reconsider the matter because any replacement Report and Recommendation could not be acted on by the Minister. Therefore the Court should not permit the Board to reconsider the matter.

[27] Prior to reviewing the law involving the issues above set out, it is appropriate to consider the nature of the order being sought. This is an application for an order in the nature of prohibition, a discretionary remedy pursuant to Rule 441 of the Alberta Rules of Court. It is not an application for judicial review of a decision rendered by an administrative tribunal.

[28] Would it be premature to consider the granting of an order of prohibition at this time? In other words, should the Court adopt a position that one should wait to see

whether the Board does in fact issue a new decision on reconsideration and then, if it does, the Applicants could apply for judicial review of that decision?

[29] A similar question was considered by the Supreme Court of Canada in ***Bell v. Ontario Human Rights Commission***, [1971] S.C.R. 756. In that case, a Board of Inquiry was established to determine whether there had been discrimination on the part of the proprietor of a rental accommodation. That Board would only have jurisdiction to make inquiry if the accommodation was of a type specifically covered by the statute at issue. A court application was launched for an order in the nature of prohibition to prohibit the Board from conducting an inquiry. On appeal of the matter to the Supreme Court of Canada, Martland, J., speaking for the Court, held that the applicant was not required to await the decision of the Board but could rightfully apply to the superior court for an order of prohibition. In delivering his reasons, Martland, J. quoted from British and Australian authorities which deal quite clearly with this issue. In ***R. v. Tottenham and District Rent Tribunal, Ex parte Northfield (Highgate) Ltd.***, [1957] 1 Q.B. 103 at p. 107, Lord Goddard, C.J. stated that:

> "(W)here there is a clear question of law not depending upon particular facts - because there is no fact in dispute in this case - there is no reason why the applicants should not come direct to this court for prohibition rather than wait to see if the decision goes against them, in which case they would have to move for certiorari. For these reasons, I think that prohibition must go."

[30] Further, Martland, J. quoted from ***R. v. Galvin*** (1949), 77 C.L.R. 432, a decision of the High Court of Australia, where the Court stated at p. 444:

> "A person against whom a non-existent jurisdiction is invoked is not bound to wait until the tribunal decides for itself whether it has jurisdiction or obtains a decision of the question by a reference or case stated or the like. He may move at once for a prohibition."

[31] The principles of the cases cited above apply in this instance. There are no facts in dispute. The question to be resolved is whether the Board lacks jurisdiction to rehear. In my view, the applicant need not await any reconsideration by the Board or any determination by the Board in relation to its own jurisdiction.

[32] What is the meaning of *functus officio?* Black's Law Dictionary, 5th edition, defines *functus officio* as follows:

> "A task performed...having fulfilled a function, discharged the office or accomplished the purpose and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also to an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect."

[33] The application of *functus officio* in the context of an administrative tribunal was addressed by the Supreme Court of Canada in ***Chandler v. Alberta Association of Architects*** (1989), 101 A.R. 321 (S.C.C.). In that case the applicable statute did not purport to confer on the board the power to vary, amend or reconsider a final decision that it had

made. At p. 332 and following, Sopinka, J., for the majority, firstly points out that the general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in ***In Re St. Nazaire Co.*** (1879), 12 Ch. D. 88. The basis for that rule was that the power to rehear was transferred by the Judicature Acts to the appellate division. In ***Grillas v. Minister of Manpower and Immigration,*** [1972] S.C.R. 577, Martland, J. opined that the same reasoning did not apply to the Immigration Appeal Board from which there was no appeal except on a question of law. At p. 333 of ***Chandler,*** Sopinka, J. states:

> "I do not understand Martland, J., to go so far as to hold that *functus officio* has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. *As a general rule,* once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction, or because there has been a change of circumstances. *It can only do so if authorized by statute or if there has been a slip or error* within the exceptions enunciated in *Paper Machinery Ltd. v. J.O. Ross Engineering Corp., supra.*
>
> To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to full appeal. *For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the re-opening of administrative proceedings in order to provide relief which would otherwise be available on appeal.*
>
> Accordingly, the principle should not be strictly applied *where there are indications in the enabling statute that a decision can be re-opened* in order to enable the tribunal to discharge the function committed to it by enabling legislation..." [emphasis added]

[34] Therefore, two key principles apply when considering the general rule that an administrative tribunal cannot revisit its decision. The first is that a flexible approach should be adopted in the application of the principle of *functus officio* to the decisions of administrative tribunals that are subject to appeal on questions of law alone, and presumably to those that are subject to review only on grounds of a jurisdictional error. Second, and most importantly in this context, an administrative tribunal can reconsider its own decision where such a review has been expressly provided for under the enabling statute, or where there are indications in the enabling statute that a decision can be re-opened by it. This latter principle was discussed in ***Chan v. Canada (Minister of Employment and Immigration)*** (1996), 43 Admin. L.R. (2d) 314 (F.C.T.D.), and in ***Zutter v. British Columbia (Council of Human Rights)*** (1995), 30 Admin. L.R. (2d) 310, where the respective courts reiterated that a decision by an administrative tribunal may be reconsidered by it, in the absence of express statutory authority or a provision to the contrary, where the enabling statute contemplates reconsideration is available.

[35] In ***Zutter,*** a council discontinued a complaint. Thereupon the petitioner applied for reconsideration of that decision on the basis that, by reason of his solicitor's error, he had been denied the opportunity to make representations before the council. The council's regulating statute contained a provision that:

> "...where the proceedings are discontinued or the complaint is dismissed, no further proceedings under this Act shall be taken in relation to the subject matter of the discontinued proceedings or the dismissed complaint."

[36] The council took the view that it did not have the authority to reconsider because of the latter statutory provision. At p. 318, Wood, J.A., for the Court, pointed out that the applicable provision does not say that any of the decisions or orders to which it applies shall be regarded as final; that when properly construed, that statutory provision does not contain any express or implied impediment to the ability of the council to reconsider its decision to discontinue. At p. 319, he states that one must consider whether there is a sufficient "indication" in the statute that a decision or order made by the Board could be re-opened when, in the opinion of the Board, the interests of justice and fairness in relation to the proceedings themselves require the re-opening. If the Board has failed to give notice or adequate notice of its appeal hearing to any person that the Board subsequently decides should have been given an opportunity to make representations at its hearing (as is directly or indirectly alluded to in ss. 86(2), 87(3) and 87(6) of the *Act* in this case), the Board may decide that the interests of justice and fairness require a re-opening. Wood, J.A. indicates that the administrative tribunal should consider the sound policy of finality in the proceedings of such tribunals in governing the manner in which the jurisdiction to reconsider is exercised by it. He cited three cases where the equitable jurisdiction to reconsider was recognized by the Courts to exist in, and found to have been properly exercised by, the respective administrative tribunals; that in each case, the jurisdiction was exercised notwithstanding the absence of any express acknowledgement of its existence in the tribunal's enabling statute.

[37] The Applicant contends that s. 92.1 of the Act is not an express authorization to the Board to reconsider any report or recommendation made that has been approved by the

Minister and filed as a judgment of this Court pursuant to s. 93.1. Rather, according to the Applicant, by necessary inference s. 92.1 merely provides the Board the right to reconsider a decision made under s. 90 under which the Board makes the final decision, or a report or recommendation made under s. 91 which has not yet been adopted by the Minister, or filed in Court under s. 93.1.

[38] One must interpret s. 92.1 to decide whether it should be given the broad interpretation suggested by the Intervenors or the narrow interpretation suggested by the Applicants. In her recent work on the interpretation of statutes, **Driedger on the Construction of Statutes** (3rd Ed. 1994), Professor Sullivan stated, after a careful and exhaustive review of the authorities, the modern rule of interpretation:

> "...courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as permissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt the interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just." (p. 131)

[39] In deciding what the intention of the legislature was in relation to s. 92.1, it is important to re-emphasize the question at issue. The question is whether the Board has jurisdiction to hold a rehearing to reconsider its Report and Recommendations. The question of whether the Minister has jurisdiction to make a replacement order if the Board issues a

varied Report and Recommendations is not before the Court, and the Minister is not a party to these proceedings. Whether or not the Minister has a right to make a varied replacement order is a separate question to be resolved another day.

[40] The right of the Board to reconsider its Report and Recommendations is explicitly set out in s. 92.1. It expressly states that the Board may review *any* decision, order, direction, report, recommendation or ruling made by it. When one applies a flexible interpretation to this statement, there can be no doubt that it was the intention of the legislature that the Board have jurisdiction to review any of its specified determinations. It may clearly review any "decision" made under s. 90, but it may also clearly review any "report or recommendation" made by it. There is no qualification attached to the specified determinations, such as stating that the jurisdiction to rehear is contingent upon the Minister not having adopted the report or recommendation. That the Minister has adopted the report is not determinative of the issue. The same could be said about the Minister making his order and giving notice of it to the Board, at least where the Minister confirms the Report and Recommendations of the Board. Without making any ruling, it seems to me that it is possible to interpret s. 92 in such a manner that the section would permit the Minister to deal with a reconsidered and varied Report and Recommendations of the Board following its rehearing.

[41] If, under s. 92.1, the Board decides, on proper grounds, to hold a reconsideration hearing, one cannot ignore the privative effect of s. 92.2 as it relates to that

Board decision: "Where this Part empowers...the Board to do anything...the Board has exclusive and final jurisdiction to do that thing..."

[42] The filing of the decision of the Board or of the Minister with the Clerk of this Court is merely an administrative act. The fact that filing has occurred has no bearing on the interpretation s. 92.1. Filing merely enhances the enforceability of a Board or Ministerial decision by equating it (in terms of enforceability) with a judgment of this Court. The decision nevertheless remains a decision of the Board or of the Minister as the case may be: ***United Nurses of Alberta v. Alberta (Attorney-General)*** (1992), 89 D.L.R. (4th) 609; ***Re Ajax and Pickering General Hospital et al and Canadian Union of Public Employees et al***, (1981), 132 D.L.R. (3d) 270. As I noted above, the Applicants were the ones who filed the Board's Report and Recommendations and the Minister's order in the office of the Clerk of this Court. In doing so, they concurrently filed a certificate noting the request of the Intervenors for reconsideration. They would perhaps be in a more sympathetic position in this Court if they had acted to their prejudice in a substantial way after the filing of the order had occurred and before they became aware of the requests for reconsideration, such as purchasing lands, proceeding with financing commitments or with substantial construction. No representations on their behalf in that regard were made.

[43] That the Board has a general power of reconsideration under s. 92.1 is supported by other cases which dealt with interpretation provisions similar in principle to s. 92.1. In ***Labour Relations Board et al v. Oliver Co-operative Growers Association***, [1963]

S.C.R. 7, the Labor Relations Board, on a union's application for a change of name (the union intending to merge with another union), made an order amending a Certification of Bargaining Authority of the union by changing the name of the union into the name of the new union. Procedurally, the Board should have first approved the merger of the two unions. The Supreme Court of Canada considered the application of s. 65(2) of the British Columbia *Labour Relations Act*, 1954 (B.C.), c. 17, relied upon by the Labor Relations Board for its authority to substitute a new union for that set out in the Certificate of Bargaining Authority previously granted by the Board. The applicable legislation contained the following provision:

> "S.65(2). The Board may, upon the petition of any employer, employers' organization, trade-union, or person, or of its own motion, reconsider any decision or order made by it under this Act, and may vary or revoke any such decision or order."

[44] Speaking for the majority, Judson, J. referred to this as a "plenary independent power" conferred upon the Board to vary or revoke any former order. The wording in the latter statute closely resembles and is similar in principle to s. 92.1 of the Act.

[45] The latter decision was applied by the Supreme Court of Canada in ***Baker and Confectionary Workers International Union of America Local No. 468 et al v. White Lunch et al***, [1966] S.C.R. 282 at p. 292 wherein, referring to the same B.C. legislative provision as above, Hall, J. indicated that the legislation was in the public interest and therefore is not "something to be whittled to a minimum or narrow interpretation in the face of the expressed

will of the legislature." The Court went on to state that the language of the section was clear, and in this respect adopted the statements of Judson, J. above. The effect of the decision tends to confirm that s. 92.1 of the Act gives to the Board wide powers to vary its decisions and reports and recommendations.

[46] The *Act* is clearly "legislation in the public interest." A narrow interpretation should not be applied. A wide interpretation tends to favor a decision that the Board has jurisdiction to rehear the matter in this case.

[47] The jurisdiction of the Board under s. 92.1 to reconsider is not without limitation. There are two limitations. First, the Board's jurisdiction to reconsider is, as the section states, subject to the principles of natural justice. Thus, in exercising its jurisdiction to reconsider a prior determination, if that would result in a breach of natural justice, then the Board should refrain from holding the rehearing. There is no present indication of breach of natural justice in this case. Secondly, the Board is limited by its own discretion. Section 92.1 specifically states that the Board "may" review or reconsider a prior determination. The statute does not provide that the Board "must" or "shall" exercise this power. It has not been indicated to the Court that the Board has decided to hold a rehearing. It may decide not to.

[48] There is case authority for the proposition that, even in the absence of express statutory authority to grant a rehearing, an administrative body has the authority to embark on a curative rehearing where a procedural defect violates principles of natural justice. ***Grillas v.***

Minister of Manpower & Immigration (*supra*) and ***Chandler v. Alberta Association of Architects*** (*supra*).

[49] Two cases reviewing decisions of administrative tribunals where they held a rehearing after allegations of procedural unfairness are: ***Ke v. Canada (Minister of Citizenship)*** (1995), 31 Imm. L.R. (3d) 309 (F.C.T.D.); ***Posluns v. Toronto Stock Exchange***, [1968] S.C.R. 330 at 340. In ***Ke***, the applicant applied for refugee status in Canada. A tribunal hearing was held and the application was refused. The applicant contested this decision on the grounds that the Board refused to hear submissions on his behalf. Subsequent to rendering its decision, the Board heard the submissions of the applicant out of the presence of the other interested parties, then issued an addendum to its decision. The question was whether the amended decision was valid. There was no statutory authority for that procedure. In allowing the appeal, McKeown, J., citing ***Chandler***, *supra*, determined that since a breach of natural justice had occurred, the error of the Board tainted the whole proceeding, requiring the tribunal to start afresh. In arriving at this conclusion, McKeown, J. adopted the following passage quoted from ***Woldu v. Minister of Manpower and Immigration***, [1978] 2 F.C. 216 (C.A.):

> "Notwithstanding the general principle, affirmed in the *Lugano* case, that an administrative tribunal does not have the power, in the absence of express statutory authority, to set aside its decision, there is judicial opinion to suggest that where a tribunal recognizes that it has failed to observe the rules of natural justice it may treat its decision as a nullity and rehear the case..."

[50] In ***Posluns, supra***, the applicant was a member of the Board of Directors of a company facing charges respecting transactions on the Toronto Stock Exchange. A hearing was held to determine the culpability of the company in relation to these charges. The applicant appeared on behalf of the company, and once a determination had been made in that respect, the Board proceeded to deal with charges concerning the applicant personally. The following day the applicant argued that he had a right to be reheard, and a rehearing was convened two days later. At issue was the validity of the tribunal's decision on the rehearing. Speaking for the Court, Ritchie, J. concluded that the failure to provide proper notice to the applicant personally constituted a breach of natural justice thereby rendering the initial decision of the Board on this issue a nullity. Given that the initial decision was a nullity, the Board had a right, if not an implied obligation, to hold a rehearing to remedy the breach of natural justice. Ritchie, J. quoted the following passage with approval from the judgment of Lord Reid in ***Ridge v. Baldwin***, [1964] A.C. 40:

> "I do not doubt that if an officer or body realizes that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid."

[51] An administrative board should have the discretion to rehear a matter whenever, in its view, notice to all interested parties was not given. ***Canadian Industries Ltd. v. Development Appeal Board (Edmonton) and Madison Development Corporation Ltd.*** (1969), 71 W.W.R. 635 at p. 639 (S.C.A.A.D.):

> "One of the purposes in setting up these boards is to provide speedy determination of administrative problems. When the possibility that through error or for any other reason proper notice has not been given to parties that have a right to be heard, it would, in my view, be in the interests of justice to clothe the boards in such cases with the power to rehear appeals with all interested parties present."

[52] It would appear that, even if there were an absence of an explicit statutory reconsideration provision, the Board has the necessary jurisdiction to rehear this matter if it decides that a party that should have been given notice of its hearing was not notified, thus not giving that party an opportunity to make representations for the hearing. The mere knowledge by such interested parties of the intended hearing and their presence at such a hearing is not sufficient to meet the requirements of natural justice that proper notice be given. ***Posluns***, *supra.*

[53] Several case authorities were advanced by the Applicant in support of its position that reconsideration of the Board's initial decision is beyond the jurisdiction of the Board but I did not find most of them to be sufficiently on point to be helpful. ***MacMillan Bloedel Ltd. v. Minister of Finance*** (1982), 28 B.C.L.R. 97 (B.C.C.A.) was concerned with the jurisdiction of the Minister to reconsider his prior determination. The Court held that the Minister, in reaching his original decision, was exercising a discretion and that for that reason and that no new relevant facts had been brought to his attention with respect to the matter, he was *functus.* There was no specific provision for reconsideration in the enabling statute.

[54] In ***Wiemer v. Director General, Canada Pension Plan Income Security Programs et al*** (1996), 122 F.T.R. 24 (F.C.T.D.), an application for judicial review, the Court decided that there was no statutory authority on the basis of which the administrative tribunal could argue that it had jurisdiction to make its decision.

[55] In ***Hunealt v. Central Mortgage and Housing Corporation*** (1981), 41 N.R. 214 (F.C.A.), the statute in question did not provide for the tribunal to reconsider its initial decision.

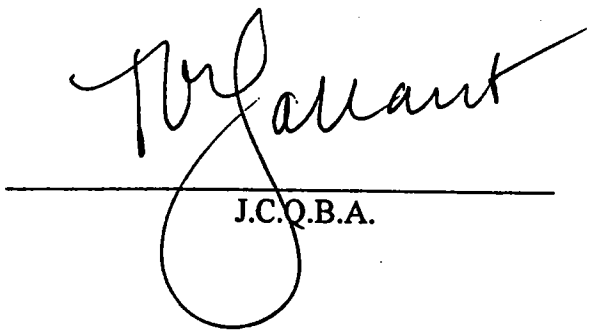
[56] In ***Vatanabadi v. Minister of Employment and Immigration*** (1993), 153 N.R. 74 (F.C.A.), the statutory tribunal was, by virtue of its empowering statute, to make "determinations" with respect to stipulated matters, and then incorporate those "determinations" into a single "decision" which would mark the conclusion of their inquiry. The determinations were not yet incorporated into a decision. Therefore, it was held that the tribunal was not *functus.*

[57] In ***Re Salinas and Minister of Employment and Immigration*** (1992), 93 D.L.R. (4th) 631 (F.C.A.) an official had not made a final determination of a claim by the time that application to quash was made to the superior court and therefore was clearly not *functus.*

[58] The Applicants have not satisfied me that under the facts of this case the Board does not have jurisdiction, by reason of being *functus officio* or otherwise, to hold a rehearing to reconsider its decision which resulted in the prior Report and Recommendations. Accordingly, I hold that the Board is not *functus* and does have jurisdiction to hold the rehearing. Having so decided, it is not necessary for me to deal with the balance of the issues raised.

[59] For the above reasons, I will not exercise my discretion in favor of granting the order applied for. The application for an order in the nature of prohibition is refused.

[60] If the parties cannot agree on costs, they may be spoken to on notice.



J.C.Q.B.A.

DATED At the City of Edmonton
this 27th day of November, 1997

Counsel:

Ronald M. Kruhlak - for Alberta Bottle Depot Association
(McLennan Ross)

Andrew C.L. Sims, Q.C. - For Environmental Appeal Board
(Self)

Joanne Esbaugh - For Jerry Lack, Director of Chemical
Assessment and Management Division of Alberta Environmental Protection
(Alberta Justice, Environmental Law Section)

Jennifer Klimek - for Nazmin Nurani and Zeini Virji-Nurani
(Kuckertz & Associates)

Mary Henderson - for 425167 Alberta Ltd.
(Cook Duke Cox)

Dennis Thomas, Q.C. - for 338802 Alberta Ltd.
operating as Millwoods & Strathcona Bottle Depots
(Milner Fenerty, Edmonton)

Action No. 9703 18343 November 27, 1997

In the Court of Queen's Bench of Alberta
Judicial District of Edmonton

Between:

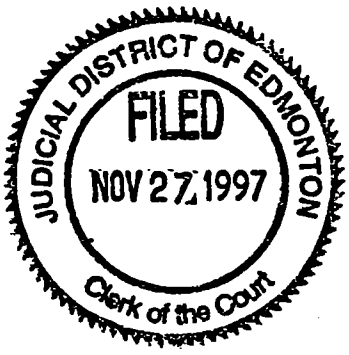
NAZMIN NURANI and ZEINI VIRJI-NURANI
Applicants

- and -

ENVIRONMENTAL APPEAL BOARD
Respondent

- and -

338802 ALBERTA LTD., operating as MILLWOODS & STRATHCONA BOTTLE DEPOTS, 425167 ALBERTA LTD., operating as BOTTLE BIN & BOTTLE DEPOT, ALBERTA BOTTLE DEPOT ASSOCIATION and DIRECTOR OF CHEMICAL ASSESSMENT AND MANAGEMENT DIVISION OF ALBERTA ENVIRONMENTAL PROTECTION
Intervenors



Reasons for Judgment of the Honourable
Mr. Justice Tellex W. Gallant

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

NAZMIN NURANI and ZEINI VIRJI-NURANI

Applicants

and

ENVIRONMENTAL APPEAL BOARD

Respondent

BEFORE THE HONOURABLE)
JUSTICE T.W. GALLANT)
IN CHAMBERS) On Thursday, the 27th day of
LAW COURTS BUILDING) November, 1997
EDMONTON, ALBERTA)

ORDER

UPON the application of Counsel for the Applicants, NAZMIN NURANI and ZEINI VIRJI-NURANI and UPON NOTING the approval of Counsel; IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. The application for an Order in the nature of prohibition is refused.

2. The Board is not functus officio and does have jurisdiction to hold a rehearing in respect of its report and recommendation dated August 22, 1997.

3. If the parties cannot agree on costs, they may be spoken to on notice.

DATED at Edmonton, Alberta, this 29 day of January 1998

for ~~JUSTICE~~ OF THE COURT OF
QUEEN'S BENCH OF ALBERTA

ENTERED this 29 day of January, 1998

CLERK OF THE COURT SEAL

APPROVED AS TO FORM
AND CONTENT BY:

ANDREW C.L. SIMS, Q.C.
for Environmental Appeal Board

JENNIFER KLIMEK
for NAZMIN NURANI and ZEINI
VIRJI-NURANI

JOANNE A. ESBAUGH
for JERRY LACK, Director of
Chemicals Assessment Management,
Alberta Environmental Protection

MARY HENDERSON
for BADUR KHERANI AND BOTTLE BIN
BOTTLE DEPOT LIMITED

RON KRUHLAK
for Alberta Bottle Depot Association

DENNIS THOMAS
for 338802 ALBERTA LTD.
operating as MILLWOODS & STRATHCONA
BOTTLE DEPOTS

Action No. 9703 18343

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

NAZMIN NURANI and ZEINI VIRJI-NURANI

Applicants

and

ENVIRONMENTAL APPEAL BOARD

Respondent

ORDER

ANDREW C.L. SIMS, Q.C.
Barrister and Solicitor
Suite 805, 10011 - 109 Street
Edmonton, Alberta
T5J 3S8

Phone: 403-423-6807
Fax: 403-423-6813
File: 5264