IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Swamy v. Minister of Water, Land and Air Protection 2004 BCSC 221

Date: 20040202
Docket: L032440
Registry: Vancouver

Between:

Sarojini Swamy

Petitioner

And

The Minister of Water, Land and Air Protection

Respondent

Before: The Honourable Mr. Justice Cullen

Oral Reasons for Judgment

February 2, 2004

Counsel for Petitioner	B.B. Clark
Counsel for Respondent	E.J. Rowbotham N.E. Brown
Place and Date of Hearing:	Vancouver, B.C. February 2, 2004

[1] **THE COURT:** The petitioner, Sarojini Swamy, is the owner of a blueberry farm located at 17669 40th Avenue in Surrey. In her petition she makes application for the following orders:

2004 BCSC 221 (CanLII)

(a) An order pursuant to the ***Judicial Review Procedures Act*** setting aside the decision of the Minister, not to make a determination, pursuant to Regulations 12(1), (3), (5) and (6) of the ***Contaminated Sites Regulation,*** that the primary land use of that portion of contaminated site 5983, specifically excluded from the certificate of compliance issued August 29, 2002, is not “agricultural.”

(b) A declaration that it is within the Minister’s jurisdiction and within the scope of the discretion given to him in the ***Waste Management Act*** and ***Contaminated Sites Regulation*** to make that determination.

[2] At the hearing of this petition, I was informed that no decision has been made by the Minister in connection with the portion of the contaminated site 5983 at issue because of the failure of the petitioner to pay the requisite fees to seek that determination.

[3] Counsel for the petitioner submitted, in the circumstances, he was simply seeking the declaration set out in the petition to the effect that the land in question could under the Regulations be designated as other than agricultural.

2004 BCSC 221 (CanLII)

[4] Counsel for the respondent agreed with the petitioner that this matter could proceed as an application for a declaration in the absence of a determination by the Minister.

[5] Having read the materials and reviewed the submissions by counsel, I have concluded that the scope of this application is somewhat limited and it involves no more than a determination whether the provisions of the ***Waste Management Act,*** R.S.B.C. 1996, Chapter 482 (the "***WMA***"), and the ***Consolidated Sites Regulation***, B.C. Reg. 375/96 (the "***CSR***") provide a mechanism in the circumstances of this case which allow the Minister to review the land use applicable to the land in question.

[6] The circumstances giving rise to this application are set out in the petition, paragraphs 2 to 22, as follows:

> 2. A portion of the Petitioner's farm was low lying and prone to flooding. No crops had ever been grown on that portion by the Petitioner nor, to her knowledge, any previous occupier of those lands.
>
> 3. In the spring of 1998, the Petitioner was approached by one Sita Tham and one Ronald Bates with a proposal whereby those respondents, who are owners of a neighbouring property, and a company wholly owned by Sita Tham, would place some fill on the low lying portions of the Petitioner's land thereby raising its height. The proposal was that the Petitioner would pay only for the trucking as the other parties had fill to dispose of, and this would save them dumping fees.

2004 BCSC 221 (CanLII)

4. Sita Tham and Ronald Bates showed the Petitioner a sample of the fill and assured her it would be suitable for placement on her farm.

5. The Petitioner reached an agreement with Bates and Tham and in August, 1998 those parties, through their wholly owned company Tham Demolition Ltd., delivered approximately five hundred loads of fill to the Petitioner's farm.

6. The soil delivered turned out to be not suitable for agriculture as it contained construction debris and polycyclic aromatic hydrocarbons in concentrations above those permitted for agricultural lands by Contaminated Sites Regulations under the Waste Management Act.

7. On October 28, 1998, the Petitioner commenced action number A982834 in the Supreme Court of British Columbia naming Sita Tham, Ronald Bates, Tham Demolition Ltd., Great West Marine Development Corp. and Joseph Lepur Construction Ltd. as Defendants. The action sought, inter alia, damages for breach of contract, negligence, and an order for cost recovery pursuant to terms of the Waste Management Act.

8. On February 6, 2001, the Minister of Environment Lands and Parks (later the Minister of Water, Land and Air Protection and referred to hereinafter as "the Minister") issued, following an inspection of the property and the receipt of experts reports, and at the request of the Petitioner, a Determination that the property was a Contaminated Site pursuant to the provisions of the Waste Management Act (contaminated site # 5983).

9. The court action between the parties was settled by an agreement reached in or about July, 2001 which was put into writing on August 29, 2001. Pursuant to the settlement agreement, the Defendants would pay the sum of $225,000.00 to the Petitioner. The payment was contingent upon the Petitioner obtaining a Certificate of Compliance from the Minister indicating that the site had been remediated.

2004 BCSC 221 (CanLII)

10. Pursuant to the settlement agreement, the $225,000.00 was placed in trust with Alexander Holburn and Company pending completion of the remediation and the issuance of the Certificate of Compliance.

11. The solicitor who negotiated the settlement agreement on behalf of the Petitioner, in order to secure his legal fees, registered a mortgage against the Petitioner's farm. He also notified Alexander Holburn & Company that he claimed a solicitor's lien on the settlement funds. As a result of foreclosure proceedings against the property and the consequent need to refinance, the Petitioner's son, Rajan Swamy, paid $100,000.00 to obtain a discharge of the solicitor's mortgage and obtained an assignment of his claim of lien against the settlement funds.

12. Due to various unexpected problems, including but not limited to the requirement from the Department of Fisheries and Oceans that a culvert be constructed to allow access for trucks to the property, over a ditch, the Petitioner determined that she would not be able to remove all the contaminated soil within the time frame required by the settlement agreement or within the budget allowed by the funds payable pursuant to the settlement agreement.

13. As a result of the difficulty or impossibility of removing all the contaminated soil, the Petitioner through her environmental consultants, Morrow Environmental Consultants Ltd. (hereinafter "Morrow") proposed to the Minister a solution pursuant to which she would remove some of the soil that was unfit for agriculture from the property and use some of it to construct an elevated roadway down the western border of her property. This was a good solution for the Petitioner as she needed road access down that side of the property and needed a "berm" to protect her property from water runoff from the neighbouring property. That proposal would save her some dumping and trucking costs. Morrow prepared and presented

2004 BCSC 221 (CanLII)

to the Ministry a remediation plan reflecting the proposal to build the elevated roadway on the western border of the property.

14. Morrow is on the Roster of Approved Experts as published by the Minister.

15. The Minister said he was satisfied with the proposed solution, approved Morrow's remediation plan and informed Morrow and the Petitioner that he would issue a Certificate of Compliance upon completion of the remediation as proposed.

16. The Petitioner, acting under the advice and direction of Morrow, did the work pursuant to the proposed remediation plan.

17. Upon completion of the remediation, and after presentation of a report by Morrow, the Minister issued a Certificate of Compliance on August 29, 2002.

18. The Certificate of Compliance specifically excluded that portion of the lands along the border of the property, which was to be used as a road, and the Certificate contained the notation that that portion of the property was "not suitable for agriculture".

19. The Certificate of Compliance was presented to the Alexander Holburn & Company and a request for payment of the settlement funds was made. Alexander Holburn & Company on behalf of the Defendants in the action refused to pay the settlement funds on the grounds that the settlement agreement called for presentation of the Certificate of Compliance for the "Contaminated Site" which was the whole farm. The Certificate of Compliance issued excluded the roadway along the western border. The exclusion of the land on the roadway, strictly speaking, meant that the roadway was still a "contaminated site." According to the Defendants in the original action that exposed them to some possible future liability as "responsible persons" pursuant to the Waste Management Act.

2004 BCSC 221 (CanLII)

> 20. The Petitioner discussed this difficulty with the Minister whose officials initially suggested that they could make a finding that the "primary use" of the roadway was other than "agricultural". Since the soil on the roadway was suitable for every purpose other than agriculture, this would mean the roadway would no longer be a "Contaminated Site". The Minister suggested that in order to do this, they would probably need to put a notation on title indicating that the roadway was "not suitable for agriculture".
>
> 21. The Minister subsequently informed the Petitioner that he could not make the finding regarding the non-agricultural use of the roadway. Although he said that for purposes of fulfilling their mandate to protect the public and the environment, the solution was entirely acceptable, he could not, on the advice of counsel from the office of the Attorney General, make the required determination as to the primary use of the lands on the roadway.
>
> 22. The Petitioner incurred considerable debts to Morrow and to other consultants, engineers and contractors in moving the earth and completing the remediation. None have been paid.

[7] It is the petitioner’s position that under the provisions of the ***WMA*** and the ***CSR*** the Minister, acting through the manager, has discretion to distinguish that portion of the petitioner’s property presently comprising the berm/roadway from the rest of the contaminated site according to the primary use of the berm/roadway, not the rest of the site. In particular, the petitioner submitted that the conversion of that portion of the site changed its use and subjected it to a

2004 BCSC 221 (CanLII)

different environmental standard, which would avoid its designation as a contaminated site.

[8] It is the respondent's position that neither the ***WMA*** nor the ***CSR*** give the manager the jurisdiction or discretion to apply different environmental standards to different parts of the same contaminated site, and, hence, in the present case, the berm/roadway cannot be treated discretely from the rest of the site for purposes of determining what standards govern its status or remediation.

[9] A manager is defined in s. 1 of the ***WMA*** as follows:

> "Manager" means a person employed by the government and designated in writing by the minister as a regional waste manager or as an acting, assistant or deputy regional waste manager.

[10] Contaminated site is defined in s. 26.1 of the ***WMA*** as follows:

> "Contaminated site" means an area of land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains
>
> (a) a special waste, or
>
> (b) another prescribed substance in quantities or concentrations exceeding prescribed criteria, standards or conditions.

2004 BCSC 221 (CanLII)

[11] The authority of a manager with respect to the determination of contaminated sites is set forth in s. 26.4 of the ***WMA***. The portions of that section relevant to this application read as follows:

> 26.4(1) A manager may determine whether a site is a contaminated site and, if the site is a contaminated site, the manager may determine the boundaries of the contaminated site.
>
> (2) Subject to subsection (3), in determining whether a site is a contaminated site, a manager must do all of the following:
>
> (a) make a preliminary determination of whether or not a site is a contaminated site, on the basis of a site profile, a preliminary site investigation, a detailed site investigation or other available information;
>
> . . .
>
> (d) make a final determination of whether or not a site is a contaminated site....
>
> (3) A manager, on request by any person, may dispense with the procedures set out in subsection (2)(a) to (c) and make a final determination that a site is a contaminated site if the person
>
> (a) provides reasonably sufficient information to determine that the site is a contaminated site, and
>
> (b) agrees to be a responsible person for the contaminated site.

2004 BCSC 221 (CanLII)

> (4) The lack of a determination under subsection (2) or (3) does not mean that a site is not a contaminated site.

[12] The authority of a manager with respect to the issuance of remediation orders is set out in s. 27.1. Of relevance to this application is 27.1(1) and (2)(a), (b) and (c), and 27.1(10). Those sections read as follows:

> 27.1(1) A manager may issue a remediation order to any responsible person.
>
> (2) A remediation order may require a person referred to in subsection (1) to do all or any of the following:
>
> (a) undertake remediation;
>
> (b) contribute, in cash or in kind, towards another person who has reasonably incurred costs of remediation;
>
> (c) give security in an amount and form, which can include real and personal property, subject to conditions the manager specifies.
>
> 27.1(10) A manager may amend or cancel a remediation order.

[13] The manager's authority with respect to the issuance of a certificate of compliance for remediation of a contaminated site is set out in s. 27.6. The particular subsections relevant to this application read as follows:

> 27.6(2) A manager, in accordance with the regulations, may issue a certificate of

2004 BCSC 221 (CanLII)

> compliance with respect to remediation of a contaminated site if
>
> (a) the contaminated site has been remediated in accordance with
>
> (i) prescribed numerical standards,
>
> (ii) any orders under this Act,
>
> (iii) any remediation plan approved by the manager, and
>
> (iv) any requirements imposed by the manager, and...
>
> 27.6(6) A manager may issue an approval in principle, a certificate of compliance or a conditional certificate of compliance for a part of a contaminated site.

[14] Different standards are applicable to determine whether or not a site is contaminated according to the land use of the site in question. The relevant portions of ss. 11 and 12 of the ***CSR*** in connection with the determination of those standards read as follows:

> 11(1) Subject to section 12 and subsections (2), (3) and (4) of this section, the definition of "contaminated site" in section 26(1) of the Act, for the purposes of paragraph (b) of that definition, means a site at which
>
> (a) the land use is agricultural, commercial, industrial, urban park or residential, and the concentration of any substance in the soil at the site is greater than or equal to

2004 BCSC 221 (CanLII)

(i) the applicable generic numerical soil standard, or

(ii) the lowest value of the applicable matrix numerical soil standards,

(b) the surface water or groundwater which is located on the site, or flows from the site, is used, or has a reasonable probability of being used, for aquatic life, irrigation, livestock or drinking water use, and the concentration of any substance in the surface water or groundwater is greater than or equal to the concentration of that substance specified for that use in Schedule 6,

(c) the concentration of any substance not specified in Schedule 4, 5 or 6 in soil, surface water or groundwater is greater than or equal to the concentration established in a standard for that substance and use by the director, or

(d) the concentration of any substance in sediment is greater than or equal to the concentration established in a criterion or standard for that substance by the director.

(2) A site is not a contaminated site with respect to a substance if the concentration of the substance in soil, surface water or groundwater at the site does not exceed the applicable site-specific numerical standard.

12(1) For the purpose of using the standards in this regulation, the land use which applies, at any given time, to a particular site or part of a site is the use which is the primary use at the surface of the site.

. . .

2004 BCSC 221 (CanLII)

(3) Subject to subsection (6), a manager may specify the applicable primary land use under subsection (1) from the following:

(a) agricultural land use;

(b) commercial land use;

(c) industrial land use;

(d) urban park land use;

(e) residential land use.

(5) In specifying the primary land use or water uses under subsections (3) and (4), a manager must take into account current and reasonable potential future land and water uses based on the following factors:

(a) current and proposed zoning for the site;

(b) land use and planning policies of the government or the municipality or municipalities in which the site and adjacent sites are situated;

(c) current site activities;

(d) proposed site activities;

(e) current and proposed uses for surface water and groundwater on the site;

(f) current and proposed land use, and surface water and groundwater uses of adjacent sites;

(g) current nearby uses of other surface water and groundwater;

(h) the potential for surface water and groundwater to cause pollution;

(i) other factors that a manager considers appropriate in the circumstances.

2004 BCSC 221 (CanLII)

> (6) If the current or anticipated future use of a site is not encompassed within any of the land uses specified in subsection (3), the land use that applies to the site must be chosen from the land uses in subsection (3) based on the historical activities at the site.

2004 BCSC 221 (CanLII)

[15] The definitions of the various land uses set out in s. 11(1) are set out in s. 1 of the ***CSR*** as follows:

> "Agricultural land use" means the use of land for the primary purpose of producing agricultural products for human or animal consumption including, without limitation, livestock raising operations, croplands, orchards, pastures, greenhouses, plant nurseries and farms.
>
> "Commercial land use" means the use of land for the primary purpose of buying, selling or trading of merchandise or services including, without limitation, shopping malls, office complexes, restaurants, hotels, motels, grocery stores, automobile service stations, petroleum distribution operations, dry cleaning operations, municipal yards, warehouses, law courts, museums, churches, golf courses, government offices, air and sea terminals, bus and railway stations, and storage associated with these uses.
>
> "Industrial land use" means the use of land for the primary purpose of conducting industrial manufacturing and assembling processes and their ancillary uses including, without limitation, factories, metal foundries, wood treatment facilities, mines, refineries, hydroelectric dams, metal smelters, automotive assembly plants, rail car or locomotive maintenance facilities, railyards, non-retail breweries and bakeries, roads and highways, wastewater and sewage treatment plants, electrical transformer stations and salvage yards.
>
> "Residential land use" means the use of land for the primary purpose of

> (a) a residence by persons on a permanent, temporary or seasonal basis, including, without limitation, single family dwellings, cabins, apartments, condominiums or townhouses, or
>
> (b) institutional facilities, including, without limitation, schools, hospitals, daycare operations, prisons, correctional centres and community centres.
>
> "Urban park land use" means the use of urban land for the primary purpose of outdoor recreation including, without limitation, municipal parks, fairgrounds, sports fields, rifle ranges, captive wildlife parks, biking and hiking areas, community beaches and picnic areas, but does not mean wildlands such as ecological reserves, national or provincial parks, protected wetlands or woodlands, native forests, tundra and alpine meadows.

[16] In approaching the question raised by this application of the extent and nature of the manager's jurisdiction and discretion, it is important to have regard for the judgment of Iacobucci J. in ***ExpressVu Limited Partnership v. Rex*** (2002), 212 D.L.R. (4th) at page 19:

> In Elmer Driedger's definitive formulation, found at p. 87 of his ***Construction of Statutes*** (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, [that] the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings.

2004 BCSC 221 (CanLII)

[17] In the case of the ***WMA*** and ***CSR***, the purposes have been held to be "the prevention of pollution and the identification and remediation of contaminated sites." See ***Beazer East Inc. v. British Columbia (Environmental Appeal Board)***, [2000] B.C.J. No. 2358.

[18] Insofar as the scheme of the ***WMA*** and ***CSR*** is concerned, it is addressed in the respondent's written argument:

> (6) Briefly, the scheme of the ***WMA*** and the ***CSR*** can be summarized as follows. If a site is a contaminated site, as defined by the legislation, then it may require remediation. See ***Workshop Holdings Ltd. v. CAE Machinery Ltd.***, 2003 BCCA 56, [2003] B.C.J. No. 165 ("***Workshop***"); ***Seabright Holdings Ltd. v. Imperial Oil Ltd.***, 2003 BCCA 57, ("***Seabright***").
>
> (7) There are several ways in which remediation can be effected: independent remediation (s. 28, ***WMA***); remediation order by the Manager (s. 27.1, ***WMA***); or voluntary remediation (s. 27.4, ***WMA***).
>
> (8) Section 27(4) of the ***WMA*** creates a statutory cause of action which authorizes any person who incurs costs in carrying out remediation at a contaminated site to pursue an action for the 'reasonably incurred cots of remediation' from a responsible person ("Cost Recovery Proceedings"). The Cost Recovery Proceedings are an important part of the legislative scheme. In fact, what judicial interpretation exists of the contaminated site provisions of the ***WMA*** and ***CSR*** has largely been the result of litigation related to Cost Recovery Proceedings.
>
> (9) Sections 26.5 and .26.6 of the ***WMA*** (and provisions of the ***CSR***) broadly defines who is a 'responsible person' and thus, who is liable for the costs of remediation. Responsible persons can include past and present owners and operators of a

2004 BCSC 221 (CanLII)

> site and producers and transporters of a substance that caused or contributed to contamination.
>
> (10) Once a site has been remediated, the Manager may issue either a Certificate of Compliance (s. 27.6(2), ***WMA***) or a Conditional Certificate of Compliance (s. 27.6(3), ***WMA***). In the present matter a Certificate of Compliance has been issued.
>
> (11) Once a Certificate of Compliance has been issued, if future owners or operators seek to change the use of the site and such a change in use will require further remediation, such owners and operators are not able to pursue Cost Recovery Proceedings against the person who obtained the Certificate of Compliance (s. 26.6(1)(l), ***WMA***).

[19] Insofar as the factual foundation for this application is concerned, the respondent pointed out that the applicant applied for a final determination, pursuant to s. 26.4(3), that the property was used for agricultural purposes and was a contaminated site within the meaning of the ***WMA*** in order to pursue cost recovery proceedings.

[20] The property applied for and designated as a contaminated site, based on its use as an agricultural site, was the entire parcel described as Lot 4, PL 33680, Section 32, Township 7, New Westminster Plan, PID 606-949-878.

[21] When the certificate of compliance was issued in August of 2002, the soils on the berm/roadway exceeded the standards for agricultural land use. The soils on the remainder of the site did not exceed the agricultural land use standards.

2004 BCSC 221 (CanLII)

[22] Since the issuance of the certificate of compliance, which excluded the berm/roadway (and the refusal of the defendants in the related action to pay the settlement funds), the petitioner has sought a determination from the manager that the roadway/berm was not a contaminated site on the basis that its use was non-agricultural.

[23] It is the respondent's position that the manager lacks jurisdiction under the legislation and regulations to issue a certificate of compliance for a site which was not contaminated, or which was contaminated and has not been remediated.

[24] The respondent further submits that the manager does not have the jurisdiction to make a determination that a site is not a contaminated site. In particular, it is the respondent's position that s. 12 of the ***CSR*** governs the discretion of a manager in specifying the land uses applicable to a site or part of a site and, hence, sets the standards by which the status of the site or part of a site is to be determined.

[25] The respondent says that s. 12(1) contemplates that the land use of each part of the site is to be determined by the primary land use at the surface of the site as a whole.

2004 BCSC 221 (CanLII)

[26] The respondent further submits that in the present case the roadway/berm remains in agricultural use because "the ***WMA*** does not contemplate the use of a number of different standards within the same site." It is the respondent's submission that to interpret the legislation or regulations otherwise would undermine the purposes of the ***WMA*** because it would permit a remediation of property by allowing contaminated material to be stockpiled in one area of the site with a request that this stockpile be treated differently from the rest of the site with the risk that the stockpile may recontaminate the rest of the property.

[27] I agree with the respondent's submissions that s. 12(1) does not contemplate the existence of more than one land use in one site.

[28] Although s. 12(1) refers to the land use which applies to "part of the site" in determining the applicable standard, it is clear on a reading of the whole of that section that the applicable land use is determined by the "primary use at the surface of the site." It is not the primary use of the surface of the site, "or part of a site," that determines the applicable land use and, hence, so long as the roadway/berm is treated as part of the contaminated site 5983, it is subject

2004 BCSC 221 (CanLII)

to the standards applicable to the primary land use of that site as a whole, which, in this case, is agricultural.

[29] I do not, however, agree with the respondent's submissions that the manager has no jurisdiction to determine that a site is not a contaminated site.

[30] Section 26.4(2)(a) and (2)(d) within the scheme established by the ***WMA*** clearly contemplate two steps which empower a manager to determine "whether or not [underlining added] a site is a contaminated site."

[31] In connection with the issue of whether there is a wide discretion for a manager to consider what constitutes a potential contaminated site, I conclude that there is. While the term "site" is not itself defined by the statute or by regulations, the definition of a contaminated site in Part 4 of the ***WMA*** refers simply to "an area of land" without reference to any boundaries, legal or otherwise.

[32] In my view, given the purposes of the Act and its scheme, which involves, among other things, distinguishing between areas of land according to land use, it would be inconsistent with the purposes and scheme of the Act and the definition of the term "contaminated site" to preclude a manager from finding more than one land use within a legal parcel of land.

2004 BCSC 221 (CanLII)

[33] I conclude, therefore, that it is open to the petitioner to make application to the manager under s. 26.4 to determine whether or not the area of land comprising the berm/roadway is contaminated. In my view, to interpret the statute and regulations in that manner is consistent with the approach approved by Iacobucci J. in ***ExpressVu Limited Partnership v. Rex***, *supra*.

[34] If two distinct areas of one legal parcel of land were legitimately devoted to different land uses engaging different standards of contamination, it would not further the objects of the Act or fit within the intention of the legislature to treat them as one solely because they fall within the same legal description or had previously been regarded as one area of land under the terms of the legislation.

[35] Conversely, it would not further the objects of the Act nor fit within the intention of the legislature to require the manager to determine discrete land uses within an area of land which is identifiable according to a primary use. To do so would undermine the effective and efficient pursuit of the purposes of the Act.

[36] Whether the area comprising the berm/roadway properly falls within the area comprising contaminated site 5983 with a primary agricultural land use, or whether it is determined to

2004 BCSC 221 (CanLII)

be a separate area of land subject to a separate primary land use, depends on the manager's determination in light of the factors set out in s. 12(2), (3) and (6) of the ***CSR*** and, of course, the land use definitions in s. 1.

[37] The final issues raised by this application are: First, whether the definition of industrial land use, which includes "roads and highways," could encompass the roadway/berm in question; and, second, whether the manager has discretion to find a non-agricultural use of an area of land notwithstanding that it may not fall into any other category of land use.

[38] As far as the first question is concerned, it turns on whether, when read in context and in their grammatical and ordinary sense, the term "roads and highways" must be construed as an industrial land use only when ancillary to "the use of the land for the primary purpose of conducting industrial manufacturing and assembling processes" or whether in their own right they can be capable of such a characterization.

[39] As I read the definition, the uses which are expressly included, "factories, metal foundries, wood treatment [plants]," et cetera, cannot be construed as identifying only uses ancillary to the principal processes contemplated as contended by the respondent.

2004 BCSC 221 (CanLII)

[40] It seems to me that the express inclusion of “roads and highways, wastewater and sewage treatment plants, electrical transformer stations and salvage yards” reflects a legislative intent to identify those specific uses as industrial for the purposes of determining the applicable environmental standard, even though they may not fit precisely within the definition of “industrial manufacturing or assembling processes and their ancillary uses.”

[41] I do not read the included uses as being ancillary uses. Rather, I read the definition of “industrial land use” as contemplating all the included uses (and any other matching use) and any uses ancillary to those specific uses. That “roads and highways” does not fit readily into the definition of “industrial manufacturing or assembling processes” is not determinative.

[42] In the definition of “commercial land use,” which is defined as “the use of land for the primary purpose of buying, selling or trading of merchandise or services,” law courts, museums and churches are included.

[43] It seems to me the context of the Act and regulations as a whole favours this interpretation, as, if roads and highways were only to be included where they were ancillary to industrial manufacturing and assembling processes, there would

2004 BCSC 221 (CanLII)

be no particular land use to determine an environmental standard for many roads and highways.

[44] Thus, I conclude a manager is not foreclosed from finding the roadway/berm to be an industrial land use.

[45] As to the final issue, whether a manager has a discretion to find a non-agricultural land use, notwithstanding that it may not fall into any other category of land use, although I am inclined to the view that a manager must find an applicable land use to establish an applicable environmental standard, I regard that issue as too hypothetical to address in this case as there are potential land uses for the manager to consider in connection with this application. Thank you.

[46] MR. CLARK: Costs, My Lord, for the petitioner.

[47] THE COURT: Any submission on costs?

[48] COUNSEL: We're not seeking any costs, My Lord.

[49] THE COURT: All right. Costs will go, then.

[50] COUNSEL: My Lord?

[51] THE COURT: Yes?

[52] COUNSEL: I think there might have been divided success on the application on the issues. So --

2004 BCSC 221 (CanLII)

[53] THE COURT: Well, the success is not -- you are right. There is some divided success. I guess the issue is whether at the end of the day the application by the petitioner can proceed. I think that is the case, and I think on that footing I would order costs to the petitioner here. Thank you.

[54] COUNSEL: Thank you, My Lord.

[55] THE COURT: All right. We will adjourn.

"A.F. Cullen, J."
The Honourable Mr. Justice A.F. Cullen

2004 BCSC 221 (CanLII)