

Appeal No. 94-011

May 11, 1995

IN THE MATTER OF Sections 84, 85 and 87 of the *Environmental Protection and Enhancement Act*, (S.A. 1992, ch. E-13.3 as amended);

-and-

IN THE MATTER OF the notices of objection from Sarg Oils Ltd. and Sergius Mankow with respect to sixteen environmental protection orders served upon them by the Director of Land Reclamation, Alberta Environmental Protection.

DECISION

Cite as: Sarg Oils Ltd. v. Director of Land Reclamation, Alberta Environmental Protection

BEFORE: William A. Tilleman, Chair

Joan C. Copp

John P. Ogilvie

REPRESENTATIONS:

Sarg Oils Ltd. and Sergius Mankow, represented by Sean M. Kubara
Director of Land Reclamation, represented by William McDonald, Esq.

I. FACTUAL BACKGROUND

On September 19, 1994, sixteen notices of objection were filed on behalf of Sarg Oils Ltd. ("Sarg") and Sergius Mankow ("Mankow") of Milk River, Alberta (collectively the "Appellants"). These appeals were filed with respect to sixteen environmental protection orders (the "EPOs") issued against the Appellants under section 125 of the *Environmental Protection and Enhancement Act* (the "Act") on behalf of Mr. Larry K. Brocke, Director of Land Reclamation, Alberta Environmental Protection (the "Director") on September 12, 1994. The EPOs required the Appellants to take certain remedial actions as more specifically set out in the EPOs with respect to sixteen abandoned well sites in and around the County of Camrose.

The sixteen EPOs which were objected to, the names and locations of the wells concerned (legal subdivision, section, township and range) are as follows:

E.P.O.	Well Name	Location
94-06	Turbo Battle South	14-25-45-20 W4M
94-07	Turbo Battle South	3-36-45-20 W4M
94-08	B.A. CS Rankin BATLS	4-36-45-20 W4M
94-09	Turbo Battle South	5-36-45-20 W4M
94-10	Turbo Battle South	6-36-45-20 W4M
94-11	Turbo Battle	10-11-46-20 W4M
94-12	Turbo Battle North	16-15-46-20 W4M
94-13	Turbo Battle South	1-22-46-20 W4M
94-14	Turbo Battle South	4-23-46-20 W4M
94-15	Tenn A4 Joarcam	16-16-47-20 W4M
94-16	Tenn C1 Joarcam	1-21-47-20 W4M
94-17	Turbo Joarcam	8-21-47-20 W4M
94-18	Tenn C4 Joarcam	7-21-47-20 W4M
94-19	Turbo Joarcam	2-21-47-20 W4M
94-20	Turbo Joarcam	9-21-47-20 W4M
94-21	A Battery Site	11-11-46-20 W4M

For the Board's convenience, the sixteen notices of objection were combined into one appeal.

The Board wrote to the Director on September 20, 1994 informing him that the appeals had been filed and requesting copies of the EPOs as well as all related correspondence and materials. The Director complied with this request and supplied the documentation to the Board on October 7, 1994.

The Board sent letters on October 20, 1994 to the Appellants and the Director seeking further information on this matter. Both provided responses to the Board as requested.

The Board sent a letter to the Energy Resources Conservation Board (the "ERCB") enquiring as to whether that Board had conducted a hearing or review with respect to Sarg's request to transfer well licences from Sarg to another party. The ERCB responded that no such hearing or review had occurred. On November 8, 1994, counsel for the Appellants sent the Board a copy of correspondence received from the ERCB, along with a Statement of Claim filed by the ERCB against Sarg.

Each EPO states that Sarg is the operator and registered lessee of the oil and gas facility identified in the particular EPO. Mankow is identified as the President, shareholder and agent of Sarg with respect to each oil and gas facility. Each further states that the ERCB caused an Order in Council to be issued directing Sarg to abandon the well located on the site for environmental reasons. Each EPO states that a reclamation inquiry was duly held on the site in the month of October, 1993. Each EPO further states that the Inspector determined that the particular site was not properly reclaimed under the Act, resulting in the EPO being issued by the Director against both Sarg and Mankow.

The Appellants' grounds for appeal are:

- that Mankow is not and never has been an "operator" within the meaning of the Act;
- neither Mankow nor Sarg carried out an "activity" designated in the Act on the sites;
- any activities carried out with respect to the sites were carried out by predecessors or successors of Sarg;
- Sarg appears as the registered licensee of each facility only because of errors and/or omissions of the ERCB in relation to transfers of well licences from Sarg to Sundial Oil and Gas Ltd. ("Sundial") in April, 1988; and
- because Sarg disposed of its entire interest in these sites in 1988, including the well licence, petroleum and natural gas rights, surface rights and any related pipeline rights, it has no legal standing to undertake any activities on the sites.

The Appellants request:

1. the Board's reversal of the decision of the Inspector and the Director to issue the EPOs,
2. a stay of the EPOs, and
3. an award of costs.

The Board has no jurisdiction to deal with the application for a stay of the EPOs; section 89(2) of the Act gives this power to the Minister of Environmental Protection.

II. THE BOARD'S REVIEW

As part of the Board's consideration under section 87(2) and (5) of the Act, the Board wrote letters to the Director and the Appellants' counsel on October 20, 1994, and requested responses by November 8, 1994. The Board asked a number of questions including: (1) the relationship of Sarg and Mankow, (2) the relationship, if any, between the Appellants and Sundial, (3) reasons why Mankow should not be considered an operator, (4) information with respect to the transactions and/or alleged errors or omissions of the ERCB in relation to the transfer of well licences from Sarg to Sundial Oil and Gas in 1988, and (5) any information with respect to the owners and tenants of the sites in question.

III. SUBMISSIONS FROM THE PARTIES

The Appellants provided the following information:

- In 1985, Sarg purchased the interest of Bankeno Resources Ltd. in the sixteen wells. Sarg took possession in the spring of 1986.
- Sarg took very little action on the wells other than reconditioning some of them and placing downhole equipment on six of the wells from which it had obtained some production for a short period of time. Sarg also used two water disposal wells.

- Sarg used some of the battery sites and when production was shutdown all flowlines were flushed with fresh water. The salt water pits were never used by Sarg.
- In the spring of 1988, Sarg sold its entire interest in the wells and batteries to Sundial.
- Sundial paid \$30,000.00 for the wells. The transaction closed and funds were released on May 27, 1988. Both Sarg and Sundial had solicitors acting for them on the transaction.
- Sundial was obliged by trust condition to provide "duplicate filed documents" of the well transfers and some adjustments were concluded in September of 1988 by which time the duplicate filed documents still had not been provided by Sundial or its solicitors to Sarg's solicitors.
- By the fall of 1988, Sundial had entered the well sites, done some reworking and testing and removed salvage.
- In early 1989, Sarg became aware that there might be a problem with respect to the well licence transfers.
- It is Sarg's position that they were not notified by the ERCB that it had not approved the transfer of the well leases from Sarg to Sundial.
- Sundial had been requested by the ERCB to file a corporate introduction and, having failed to do so, the ERCB denied the application to transfer the licences from Sarg to Sundial.
- The ERCB gave notice to Sarg to suspend the wells, pursuant to section 3.030(3) of the regulations enacted pursuant to the *Oil and Gas Conservation Act*, and it failed to do so.
- The ERCB ordered Sarg, by Order in Council, to abandon the wells which it failed to do.

The Appellants' Position

It is Sarg's position that the system "broke down" and that Sarg, although technically the licensee on the records of the ERCB, is not the owner because of the sale transaction completed by its solicitors. It is Sarg's position that the fault lies with the ERCB or its own solicitors. On behalf of Mankow, it is submitted that he is not an "operator" within the meaning of section 119(b) of the Act and therefore an EPO cannot be issued against him.

It is further submitted on behalf of the Appellants that even if the Director could issue an EPO against Sarg and Mankow, he cannot at the current time, because such an interpretation would create retroactive liability upon them and would interfere with vested rights.

The Director's Position

The Director's position is set out in a letter submitted to the Board dated November 8, 1994. It is his position that Sarg falls within subclause (ii) of the definition of operator contained in section 119(b). "Activity", as referred to in the definition, is defined in section 1(a) of the Act as meaning "an activity that is listed in the Schedule". Section 3 of the Schedule lists the "drilling, construction, operation or reclamation of a well other than a water well". The wells that are the subject of the EPOs fall within this provision. The Director's position is that Sarg is carrying on activity on specified land, which is defined in section 119(f) as land "within the meaning of the regulations...". "Specified land" is defined in the Conservation and Reclamation Regulation as "including the construction, operation or reclamation of a well". "Well" is defined in section 1(yyy) of the Act as meaning "except in Part 6, any well, whether or not a licence is required in

respect of it under the *Oil and Gas Conservation Act*".

The Director's position is that the wells which are the subject of the EPOs are recorded on the records of the ERCB as licenced to Sarg. As such, Sarg falls within the definition of "operator" and the EPOs are validly issued against Sarg. It is the Director's position that the transfer of wells is an exclusive function of the ERCB and the Director relies upon the ERCB to identify the operator of the well (as wells do not require an approval under the Act) and the Director is entitled to rely upon such records.

Further, it is the position of the Director that the definition of "operator" is not intended to identify only one person who is responsible under the Act. He takes the position that he can issue an environmental protection order to the current holder of the well licence and it is that person's responsibility to seek contribution from other parties if he thinks it appropriate. This is also consistent with the approach taken by the ERCB. The Director takes the position that Mankow falls within the definition of "operator" set out in section 119(b)(iv) and is a person against whom an environmental protection order may be issued under section 125 of the Act.

The Director request that the Board confirm the EPOs and direct the Appellants to comply with their terms.

IV. DECISION

The sixteen notices of objection were submitted by the Appellants under section 84(1)(f) of the Act and were submitted within seven days after having received a copy of the EPOs in accordance with section 84(4)(a) of the Act. In addition, the

ERCB has not conducted a hearing or review of all of the matters in this appeal and, accordingly, this Board does not have to undertake an inquiry to establish whether or not similar parties or evidence were before the ERCB.

This appeal raises two issues both of which relate directly to whether or not the Director erred in issuing the EPOs against Sarg and Mankow. The issues are as follows:

1. Is Sarg an operator?
2. Is Mankow someone against whom an environmental protection order can be issued?

Section 119 of the Act states:

"(b) 'operator' means

- (i) an approval holder who carries on or has carried on an activity on or in respect of specified land,
- (ii) any person who carries on or has carried on an activity on or in respect of specified land other than pursuant to an approval,
- (iii) a successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in subclause (i) or (ii), and
- (iv) a person who acts as principal or agent of a person referred to in subclause (i), (ii) or (iii);" and

"(f) 'specified land' means specified land within the meaning of the regulations on or in respect of which an activity is carried on, but does not include

- (i) land used solely for the purposes of an agricultural operation,
- (ii) subdivided land that is used or intended to be used solely for residential purposes,

or

- (iii) any part of any unsubdivided land that is the site of a residence and the land used in connection with that residence solely for residential purposes;"

It is the Appellants' position that the ERCB should have transferred the registration of the well licences from Sarg to Sundial and they have made several arguments as to what happened in this situation. With respect, the Board does not agree. The ERCB maintains a register of licence holders and the Board finds that it is reasonable for the Director to consult that register in determining who is an "operator" within the meaning of the Act. He has acted within the scope of his authority in coming to the decision that he did.

Protection of the environment is clearly one of the most important goals found in the Act. Section 2(a) of the Act says:

"The purpose of this Act is . . .

the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society; . . .".

Above all else, the Director should act to protect the interests of the public in life, health, and a harmonious relationship with a clean environment. If there is a doubt about causation of pollution or the distribution of liability among persons, section 119 of the Act is worded in such a fashion that places environmental protection as a priority. The section gives the Director the ability to make orders against a variety of persons.

The Board will not comment further on the various matters that have been raised by both Mankow and Sarg in this appeal. If these parties feel aggrieved, there are other legal avenues of recourse available to them. It is not this Board's responsibility to conduct an examination for discovery or trial with respect to any alleged errors or omissions on behalf of either the ERCB or Sarg's former solicitors.

The Appellants believe that the effect of the Director issuing the EPOs against them is to impose liability upon them for actions which may have taken place in the past. In support of their position, the Appellants cite certain cases: *Upper Canada College v. Smith*¹, *Angus v. Sun Alliance Insurance Co.*², *Gustavson Drilling (1964) Limited v. M.N.R.*³, *Spooner Oils Ltd. and Spooner v. The Turner Valley Gas Conservation Board and the Attorney General of Alberta*⁴.

¹ (1920) 61 S.C.R. 413

² [1988] 2 S.C.R. 256

³ [1977] 1 S.C.R. 271

⁴ [1933] S.C.R. 629

The law of retroactivity and retrospectivity of legislation is clearly set out in the cases to which the Appellants' solicitors refer. It is important to note that the inference against retrospectivity is rebuttable where the intent to do so is clearly set out in the legislation. The Board finds that in both Part 4, Division 2 and Part 5 of the Act that the Legislature has clearly intended that orders may be issued against persons on a retrospective basis. This is also consistent with both the purpose of the Act as set out in section 2 and, in particular, section 2(i) which states that polluters should pay for the costs of their actions.

The Board finds that the Director was correct in determining that Mankow is a person against whom an environmental protection order can be issued under the Act. He is the shareholder and president of Sarg and is therefore unquestionably an agent of the operator. The Board has already found that Sarg was an operator within the meaning of the Act and it therefore follows that Mankow is a person against whom an order can be issued.

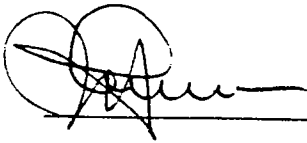
Having decided both of these issues, the Board finds that the Director did not err in issuing the environmental protection orders against Mankow and Sarg.

The appeals of Sergius Mankow and Sarg Oils Ltd. are dismissed. The Board confirms the environmental protection orders issued by and on behalf of the Department of Environmental Protection dated September 9, 1994 and served on September 12, 1994. It orders Sergius Mankow and Sarg Oils Ltd. to comply with the terms of those orders.

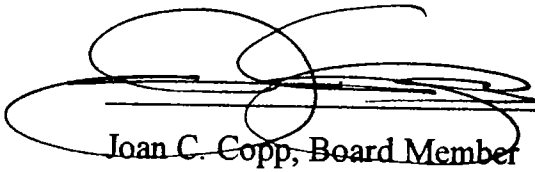
V. CONCLUSION

The appeals are dismissed. No order is made with respect to costs.

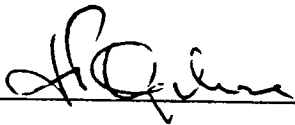
Dated on May 11, 1995.

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William A. Tilleman, Chair

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Joan C. Copp, Board Member

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John P. Ogilvie, Board Member