CASE NOTES
Victoria

Environmental Auditor's Appointment Revoked by EPA

Richard Alan Graham v Environment Protection Authority and Robinson

(No. 8453 of 1995, Supreme Court of Victoria, Beach J, delivered, 23 February 1996)

This was a decision following an application by an environmental auditor to quash the decision of the Environment Protection Authority (EPA) made in October 1995, whereby the EPA revoked the auditor's appointment as an environmental auditor pursuant to section 57 of the *Environment Protection Act* 1970 *(Vic)*.

Facts

The applicant had been engaged by the Victorian Government Major Projects Unit to carry out an environmental audit of 40 hectares of land in Port Melbourne. The land had previously been used for a range of industrial and commercial purposes and was the subject of a clean up notice. One of the requirements of the notice was for a certificate of environmental audit to be submitted to the EPA. The applicant issued the certificate of environmental audit on May 1992. It stated that he was of the opinion that the condition of the land at the site was neither detrimental or potentially detrimental to any potential use of the land.

In May 1995, the developers of the site discovered a large quantity of contaminated soil necessitating the removal of approximately 21,000 cubic metres of soil from the site. As there was no evidence of recontamination of the site between the issue of the environmental audit and the discovery of the contaminated soil, it followed that the soil must have been present on the site at the time the certificate of environmental audit was issued.

In September 1995, the EPA served a notice of review on the applicant of his appointment as an environmental auditor. The applicant made written and oral submissions to the EPA alleging that the conclusions reached on the outcome of the soil treatment process and suitability of the future use of the site were based on standards and reasonable judgment appropriate in 1992. He stated that the changes that had occurred at the site could not have been foreseen and that conditions prevailing in 1995 could not be used to judge those in 1992.

The applicant's appointment as an environmental auditor was revoked by a letter from the Chairman of the EPA on October 3, 1995. The Chairman stated that on the basis of the issue of the incorrect certificate of environmental audit, the Chairman had decided to exercise the EPA's power under Section 57 of the Act to remove the applicant's appointment as an auditor. In his reasons for decision, the Chairman made it clear that he rejected the applicant's allegations. The Chairman stated that when issuing a certificate, an auditor needed to consider and anticipate the physical, chemical or biological changes on the site when making his or her assessment.

Decision

The applicant sought to challenge the EPA's decision on a number of grounds:

* That the Authority lacked the power to make the decision to revoke the applicant's appointment;
* The decision and the reasons for the decision contained errors of law;
* There was no evidence or other material to justify the making of the decision;
* In making the decision, the EPA failed to take account of relevant considerations; and
* The decision was so unreasonable that no reasonable person, exercising the powers of the EPA could have so exercised the powers.

Beach J. rejected all five of the applicant's grounds.

In relation to the first ground, the applicant had contended that the only power that the EPA has to revoke an auditor's appointment is where the auditor has been convicted of an offence against sub-section (5) or (6) of section 57AA of the Act - that is, where the auditor fails to send a copy of the environmental audit report to the EPA, where the environmental auditor gives false or misleading information to the EPA, issues a certificate or statement of environmental audit which is false or misleading or conceals any relevant information or documents from the EPA.

Beach J. held that section 41(1) of the *Interpretation of Legislation Act* 1984 (Vic) applied. That section states:

> "Subject to subsection (2), where an Act or subordinate instrument confers on a person or authority a power to make an appointment to an office or position, that person or authority has, unless the contrary intention appears, the power to remove or suspend a person appointed to the office or position and to appoint another person temporarily in the place of a person so removed or suspended or in a place of a sick or absent holder of an office or position."

Beach J. said that there was nothing in the *Environment Protection Act* which expressed a contrary intention nor did it suggest that Parliament had intended to make conviction the sole ground for revocation of an appointment. Beach J. felt that to so narrowly construe the Act would lead to an absurdity.

Beach J. could not discern any errors of law in the Chairman's decision or his reasons for decision. He found that the evidence upon which the revocation was based was set out in the notice of review (which was undisputed by the applicant) and that such findings of fact by the EPA were not open to review by the court. Beach J. held that, in relation to the final two grounds, the EPA was entitled to reject the applicant's submissions regarding the changes in the land between 1992 and 1995 and it was not bound to take into account the applicant's previous record as an environmental auditor when arriving at its decision in relation to the auditor's appointment.

Conclusion

This decision illustrates the care that must be taken by environmental auditors when issuing certificates or statements of environmental audit. It also demonstrates the fact that the EPA's power to revoke the appointment of an environmental auditor is not limited by section 57AA(7) of the Act and, in the absence of a manifest error on the part of the EPA, the courts are unlikely to interfere or overturn the EPA's decision to revoke an appointment.

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New Zealand

The Precautionary Principle

In recent years, there has been considerable interest in and debate over the so-called "precautionary principle" or "precautionary approach". The concept has found its way into the *New Zealand Coastal Policy Statement*, the *Hazardous Substances and New Organisms Bill* and is referred to in a number of Regional Policy Statements promulgated under the *Resource Management Act*. However, incorporation of the concept into New Zealand legislation and planning processes, in the absence of a clear understanding of the meaning, implications and application of the principle, raises real uncertainties.

McIntyre v Christchurch City Council

The recent decision of the Planning Tribunal in *McIntyre and Others v Christchurch City Council* (A15/96) addresses the relevance of the precautionary principle in the context of a resource consent application.

The appeal was against the Council's grant of consent to BellSouth to construct a base transceiver for mobile telephones in Ilam, Christchurch.

The hearing focused on the question of the harmful effects from the radio frequency radiation from the facility. The appellant's case was that a serious hypothesis exists that exposure to the amounts of radiation that would be emitted by the proposed transmissions is potentially harmful to health. They contended that national and international standards do not address or apply what they termed the "risk avoidance policy" of the RMA and that it would be an error of law to decide on the present state of scientific knowledge, on the balance of probabilities, whether there are harmful health effects from low-level radio frequency exposure from these facilities. In addressing this issue, the Tribunal discusses a number of matters worthy of comment.

Compliance With Standards Not Decisive

Radio frequency radiation is addressed by New Zealand Standard NZS6609:1990. It is an adoption of the corresponding Australian Standard AS 2772:1990. The standard sets separate maximum levels for occupational and