

**IN THE PROVINCIAL COURT OF ALBERTA
CRIMINAL DIVISION**

Between

HER MAJESTY THE QUEEN

and

MCCOLMAN & SONS DEMOLITION LTD.

AGREED STATEMENT OF FACTS

SUMMARY OF THE CHARGES

1. The company has pled guilty to one count under the *Environmental Protection & Enhancement Act* (as amended) for knowingly operating a landfill without a registration (Section 60) over a two year period, from January 28, 2008 to May 27, 2010, and one count under the *Water Act* (as amended) for conducting an unauthorized activity (Section 142(1) (h)) in connection with the destruction of a wetland, sometime between January 28, 2008 and May 10, 2010. The offence dates are based upon inspections by Alberta Environment and aerial photographs of the site.

POSITION OF THE PARTIES

2. There is a joint recommendation for:
 - a. a three year stop order (the maximum under the Act) that would prevent the company from using the lands as a landfill; and
 - b. an Order requiring the company to remediate and monitor the lands pursuant to the Waste Remediation and Monitoring Plan at an estimated cost of \$1.85 Million
3. As to the fine portion of the penalty, while the more typical fine for such an activity would be in the range of \$100,000.00, the company has provided the Crown with its financial records, and given the cost to remediate the lands and restore the environment, the Crown is content that an additional fine of \$20,000.00 (inclusive of victim fine surcharge) would compensate the citizens of Alberta for the cost of the investigation, yet not put the company out of business.

LOCATION AND PHYSICAL SETTING

4. The site is approximately 75 acres of relatively flat land located in Strathcona County. Aerial photographs dating back to 1967 show a wetland located in the northern part of the property.

SUMMARY OF EVENTS

5. The company is in the demolition business and for many years operated landfill on their property for the storage, recycling and disposal of demolition materials.
6. The landfill operation first received a permit in 1991 under the *Public Health Act*.
7. In 1993, jurisdiction for landfills was transferred from health authorities to Alberta Environment. Amendments under the environmental legislation gave operators a five year grace period in which to obtain authorization under the new licensing regime.
8. The transitional period created challenges for the regulators and industry alike. The new legislative scheme required landfills to comply with the terms of a *Code of Practice for Landfills* ("Code"). The Code set minimum standards for the operation of landfills and provided requirements for registering those facilities.
9. However, for the Code to apply, notification must have been provided by Alberta Environment. Alberta Environment did not notify the company and so the Code did not apply.
10. Essentially, the *Environmental Protection & Enhancement Act* required that the landfill be registered. However, the requirements and procedures for registration under the new legislative scheme were provided in the Code, which did not apply because Alberta Environment did not notify the company.
11. In 2005, there was a complaint that the company was operating without registration. The company's position was that they did not need registration as they believed that the old permit issued by the county health authority was still in effect. There were ongoing discussions between the company and Alberta Environment but on January 28, 2008, the department formally demanded that the company apply for registration or face potential enforcement action.
12. While the registration itself costs only a few hundred dollars, the real cost is in complying with pre-requisites for registration, which include site assessment and design by a professional engineer.
13. There was no activity on the file until September of 2009 when there was a further complaint that the company was operating without registration. The company was ordered to cease operations. However, some operations were continued during that time.

14. In the spring of 2010, an Alberta Environment Investigator visited the site on more than one occasion and noted that:
 - a. the wetland located in the northern portion of the site was partially filled in with soil material; and
 - b. improper wastes were being stored on site.

Following these site visits, Alberta Environment notified the company that it was in contravention of environmental legislation and that operations should cease immediately until the proper registration was in place.

15. In the summer of 2010, the company retained a consultant to quantify and characterize the wastes deposited on site since 2008, and to prepare a remediation plan accordingly. Aerial photos from this time show that no new wastes were being accepted on site at that time.
16. Remediation of the disturbed wetland was completed in early spring of 2010.
17. In December 2011, a consulting firm hired by the company conducted a Phase II site assessment to monitor groundwater quality and to confirm the suitability of the site for landfill operations. After review of the Phase II site assessment report, Alberta Environment directed that further study be undertaken to determine the geological suitability of the site as a landfill. The area in question is in the vicinity of a “hidden valley”, which describes a glacial deposit of sand and gravel. Given the composition of the underlying strata, concern was raised as to the suitability of the site for landfill operations and protection of groundwater in the area.
18. The consulting firm hired by the company released a second report to address the concerns of Alberta Environment. The second report concluded that the site did not meet the standard for the natural protection of groundwater but that there was no measureable impact of the landfill on the groundwater quality in the area. The recommendation was to close the landfill, to continue groundwater monitoring, but to leave the material currently in the landfill *in situ*. The estimated cost of this proposal was approximately \$300,000.00.
19. After review of the consultant’s second report, Alberta Environment determined that the site was not geologically suitable for a landfill.
20. In consultation with Alberta Environment, the company submitted a detailed remediation plan that included excavation and removal of all landfilled materials on site. The cost of excavating and removing all landfilled materials is substantially higher than the previous proposal to leave the materials *in situ* and monitor groundwater.

AGGRAVATING FACTORS

21. Investigators learned in the course of inspections of other demolition companies in the Edmonton area, none had onsite landfills. The more typical practice was to use bins at the demolition site to separate waste from recyclables and to then haul the bins to commercial landfills.
22. In the two years that the McColman landfill operated illegally, the company enjoyed some economical benefit over its competitors by having the onsite landfill.

MITIGATING FACTORS

23. The accused have cooperated with the authorities. The officer of the corporation acknowledged that they had been operating without registration in connection with the landfill, or an approval with respect to the wetland area.
24. Upon notification of the impact to the wetland area, the corporation properly undertook remediation of the vegetation area in the vicinity of the wetland.
25. Triable issues exist in relation to whether the company was operating with or without the required authorizations regarding landfilling operations. The company's initial position, that the permit under the *Public Health Act* was still in effect, has some merit.
26. Amendments in 2003 to the *Activities Designation Regulation* (AR 211/96) created a potential loophole. The new section 9(1) had slightly different wording from the original version:

Transitional - permits

9(1) Where before the coming into force of the *Activities Designation Regulation* (AR 211/96) a person held a permit to operate that was issued under the *Public Health Act* and was in respect of

(b) an activity listed in Schedule 2, Division 1 of this Regulation, that permit is deemed to be a registration for the purposes of the Act.

(3) A deemed registration referred to in subsection (1) (b) has no expiry date.

27. On a plain reading of the words, an argument could be made that because the company had a permit before October 1, 2003 that it was a "deemed" registration without an expiry date.
28. However, the Crown was prepared to argue that the only logical interpretation is that the change of date for registration would only apply to those registrations that had not

already expired. Similar to the situation in *Regina v. ASL Paving Ltd.* (Alberta Court of Appeal), it would make no sense to interpret new regulations as reaching back in time to create an exemption.

29. As well, defence counsel had raised the question of whether the failure of Alberta Environment to provide written notification under section 24(3) of the *Activities Designation Regulation* would give rise to defence. The position of the Crown was that it did but only with respect to a potential charge under section 24(1) of the *Waste Control Regulations* for failing to comply with a Code of Practice.
30. The company has satisfied the Crown that the remediation activities proposed will serve to rehabilitate the environment, while not putting the company out of business. The proposed remediation activities come at an estimated cost of over \$1.85 million to the company.
31. The company is willing to make failure to comply with the remediation plan punishable by contempt of the court's order. While Alberta Environment has civil powers to effect remediation, they would be limited to the period of time when the company was operating without a registration. Further, if an order were to be issued the accused has a right of appeal, which would delay the restoration work. Finally, default on a civil order would only create an unsecured debt. Given the company's financial situation, if the company cannot undertake the work, the government would be forced to at a considerable expense to taxpayers.
32. By incorporating the remediation plan as part of a creative sentence, the proposed work goes beyond what could have been ordered in the civil context to include the removal of materials pursuant to the Waste Remediation and Monitoring Plan whether lawfully deposited or not. Furthermore the work can begin immediately. Finally, should the company default on the order of the Court, there are a number of options, including contempt and filing the order as a writ of execution against the land, which would create a secured debt.
33. Given the proximity of the site and the soil conditions of the area, the protection of the quality of the groundwater is of paramount consideration to the Crown.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.