

## **EUB Gives Conditional Green Light on Sour Gas Wells Outside Calgary**

*Compton Petroleum Corporation Applications for Licences to Drill Six Critical Sour Natural Gas Wells, Reduced Emergency Planning Zone, Special Well Spacing, and Production Facilities Okotoks Field (Southeast Calgary Area) (22 June 2001), Decision 2005-060 (Alberta Energy and Utilities Board) Applications 127857, 1276858, 1276859, 1276860, 1307759, 1307760, 1278265, and 1310361*

**By Jodie Hierlmeier**  
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In a decision released on June 22, 2005, the Alberta Energy and Utilities Board (the "EUB" or "Board") considered applications by Compton Petroleum Corporation ("Compton") to drill six critical sour gas wells along the southeast edge of the city of Calgary, and to reduce the emergency planning zone ("EPZ") associated with those wells. The EUB found that four wells could be drilled safely, but refused to issue well licenses until Compton revised and resubmitted an emergency response plan for a EPZ in accordance with the Board's directions. Although the well licenses have not yet been issued, the question remains whether this decision sets a precedent for developing sour gas wells near densely populated urban centres.

### **Background**

Compton's applications raised many concerns due to the high hydrogen sulphide (H<sub>2</sub>S) content of the proposed wells<sup>1</sup> and its plans to reduce the EPZ associated with those wells. The wells would be located about 4.5 kilometres ("km") from the nearest communities in Calgary, and 1.1 km from the city limits. Given the proximity of the proposed wells to existing rural residences, the city of Calgary and to several other communities, a total of 21 interventions were received from resident groups, adjacent landowners, municipal authorities, health authorities, and corporations holding land interests in the area expressing concerns about the proposed wells.<sup>2</sup>

### **Emergency planning**

The decision whether to grant the well licenses was contingent upon the adequacy of Compton's emergency plans. Before a sour gas well is drilled, the EUB requires an applicant to submit a site-specific emergency response plan. This demonstrates how the applicant will ensure public safety in the event of an uncontrolled release of H<sub>2</sub>S. The plan is developed according to a calculated EPZ using a formula based on the maximum H<sub>2</sub>S release rate of the well. For Compton's well applications, the calculated EPZ radius was 11.94 km during the drilling phase and 14.97 km during the completion phase. It was estimated that more than 250,000 people lived and worked within the calculated 14.97 km EPZ.

Compton applied to reduce the EPZ to 4 km for both the drilling and completion operations. The reason for this application was that Compton had committed to ignite a well release within 15 minutes<sup>3</sup> and that it would be difficult or impractical to evacuate such a large number of people in a short timeframe.

The EUB denied Compton's application for the reduced EPZ, finding that it was not sufficiently protective of public safety. The Board also found that Compton's emergency response plan for the reduced 4 km EPZ "lacked sufficient detail and was deficient."<sup>4</sup> Rather than dismissing the application on those grounds, the EUB directed Compton to revise its emergency response plan based on a 9.7 km EPZ (the "revised EPZ"),<sup>5</sup> comprised of a 5 km mandatory evacuation zone and a 4.7 km sheltering zone. Residents in the sheltering zone would be notified of any emergency but would remain in their homes until the sour gas passed over the area.

In addition to the revised EPZ, the Board directed Compton to incorporate over 20 components into its revised emergency response plan.<sup>6</sup> Some of the directions included:

- adopting a unified command approach with municipalities and the Calgary Health Region to implement emergency responses within and beyond the revised EPZ;
- providing a detailed response protocol to address the area beyond the revised EPZ;
- relocating one family during the drilling and completion stages due to concerns about the safety of the wells and air quality given the close proximity of the family's home to the well sites;<sup>7</sup>
- providing nonautomated personal notification to those who have requested it within the 5 km evacuation zone;
- updating public consultation and maps of the area (on a one-time basis);
- conducting a minimum of two major deployment exercises with the actual drilling and response crews, the first of which must be completed before Compton enters the first sour zone; and
- allowing the provincial government, municipalities and the city to evaluate the deployment exercises and provide recommendations.

The Board also placed time limits on submitting the revised emergency response plan. Compton must advise the Board by August 15, 2005 if it intends to pursue these applications further and, if so, it must file a complete, revised emergency response plan by November 1, 2005. It is open for Compton to submit a request to extend the deadline, provided it makes this request before November 1. Upon receipt of the revised plan, the Board will, at a minimum, give those parties at the hearing the opportunity to comment in writing on the finalized emergency response plan.

**Other conditions**

Aside from the Board's directions on a revised emergency response plan, Compton must meet 14 further EUB conditions.<sup>8</sup> These include technical changes to make the drilling and completion operations safer as well as time limits on the well licenses. If the licenses are issued, they will expire on January 1, 2008. Licenses for wells that have not been spudded (begun drilling) by that date will become invalid. Further, the wells and surface facility must be abandoned and removed 15 years from the date of the first well license approval or by July 1, 2021, whichever is earlier.<sup>9</sup> The Board expects that reclamation activities would be initiated after abandonment but did not specify timelines for reclamation to occur or to be completed.

**Public consultation**

The Board was critical of Compton's approach to public consultation, which was based on meeting the minimum requirements. In light of the unique and complex circumstances of the application, the Board found that a broad, inclusive and ongoing public involvement program should have been implemented and maintained.<sup>10</sup> The Board emphasized that the EUB guidelines for public consultation were minimum expectations only and that an applicant's responsibility for public consultation did not conclude once its applications had been filed with the Board. These comments by the Board appeared to be intended to address interveners' concerns that Compton was "unresponsive and unilateral in its actions."<sup>11</sup>

The Board directed Compton to provide, at a minimum, an updated and detailed public information package on its revised emergency response plan to all interested parties for review and comment. Further, the Board expected Compton to discuss with those parties included in the revised emergency response plan (within the 9.7 km radius) how it incorporated their concerns and the provisions it put in place to protect their safety.<sup>12</sup>

**Comment**

On a positive note, this decision highlights the Board's commitment to public consultation. However, in past decisions the Board has been persuaded to reject energy applications if consultation was inadequate and the company was found to have poor relations with the public.<sup>13</sup> Although Compton was reprimanded for its minimalist approach to consultation, the Board did not go as far as rejecting the well applications on this basis.

In its decision, the Board avoided the difficult question of whether energy projects should be located in or near densely populated areas of the province. Ultimately, the Board concluded that the proposed wells could be drilled safely and that the granting of the well licenses was in "the public interest" provided that Compton gained the Board's approval of its revised emergency response plan.<sup>14</sup> While arguably the Board has made it difficult for Compton to go ahead with its applications by imposing many conditions, directions and timelines, the Board has also left the door open for Compton to obtain the well licenses. Furthermore, even if Compton decides not to pursue the well applications, the door is open for other companies to apply to develop energy projects near urban areas provided they can submit adequate emergency response plans and can commit to inclusive, ongoing public consultation and involvement.

Potentially, this was a decision fraught with huge implications for a province with many rapidly growing urban and suburban areas, and increasing land use pressures. Instead of addressing these issues, the EUB placed the ball squarely in Compton's court, leaving parties with concerns about energy development to wait for Compton's next move.

<sup>1</sup> The wells are level two critical sour gas wells, with a hydrogen sulphide content of 35.6 percent, see Alberta Energy and Utilities Board Decision 2005-060 at 1.

<sup>2</sup> *Ibid.* at 7.

<sup>3</sup> Alberta Energy and Utilities Board *Interim Directive 2001-5* allows an applicant to apply for a reduced EPZ of a minimum radius of 4 km provided that there is a commitment to ignite a well release within 15 minutes of the release. Ignition of the release results in the conversion of H<sub>2</sub>S to sulphur dioxide (SO<sub>2</sub>). Although SO<sub>2</sub> also presents a hazard, the additional plume rise from combustion results in dispersion which reduces the exposure to the hazard at ground level, see *ibid.* at 32-33.

<sup>4</sup> *Ibid.* at 42-43.

<sup>5</sup> The revised EPZ was based on dispersion modelling results provided by consultants retained by the Front Line Residents Group, an intervener, in the application, see *ibid.* at 34-36.

<sup>6</sup> *Ibid.* at 44, 48-50.

<sup>7</sup> *Ibid.* at 23-24.

<sup>8</sup> A summary of the conditions are provided, see *ibid.* at 55-56.

<sup>9</sup> See *Dynegy Canada Inc. Application for Pipeline Licence Amendments, Okotoks Field; Pinon Oil and Gas Ltd. Application for a Sour Gas Compressor Station and Pipeline Licence, Crossfield Field* (21 March 2000) Decision 2000-20 and Decision Addendum 2000-20 (Alberta Energy and Utilities Board) Applications 1034767 and 1034762. As part of its decision affecting the Chestermere sour gas pipeline system, the EUB accepted a collaborative Land Use and Resource Development (LRD) Agreement between directly involved area landowners, Compton, and other industry parties (the Chestermere pipeline was formerly licensed to Dynegy Canada Inc.). This agreement contemplated the accelerated depletion (within 15 years) of sour gas reserves from the lands involved in the Compton applications. The purpose of Compton's applications to drill the additional wells would be to comply with the LRD Agreement and to realize this accelerated depletion.

<sup>10</sup> *Supra* note 1 at 42.

<sup>11</sup> *Ibid.* at 42.

<sup>12</sup> *Ibid.* at 48.

<sup>13</sup> See Keri Barringer, "Sour Gas Well Application Denied" *Environmental Law Centre News Brief*, vol. 19:1, 2004, online: Environmental Law Centre <<http://www.elc.ab.ca/publications/NewsBriefDetails.cfm?ID=805>>; Cindy Chiasson, "EUB Rejects Sour Gas Well for Public Safety" *Environmental Law Centre News Brief*, vol. 16:2, 2001, online: Environmental Law Centre <<http://www.elc.ab.ca/publications/NewsBriefDetails.cfm?ID=709>>; Shawn Denstedt, "EUB Demands More Effective Public Consultation" *Environmental Law Centre News Brief*, vol. 15:2, 2000, online: Environmental Law Centre <<http://www.elc.ab.ca/publications/NewsBriefDetails.cfm?ID=672>>.

<sup>14</sup> *Supra* note 1 at 26.

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## Deterrence of Environmental Offences: Legislative and Judicial Roles in Promoting Deterrence Measures

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Environmental protection should not simply be about punishing those who harm the environment. Indeed, sustainable development and principles of pollution prevention

and the precautionary approach mandate that we frame our laws and policy to promote compliance by deterring non-compliance.

The deterrence rationale is arguably more important in the environmental sector as violations of environmental laws are inherently more "deterrence friendly" when compared to true criminal violations, generally being more calculated and less impulsive violations of the law. Effective deterrence measures and adequate sentencing of environmental prosecutions are central to having companies and individuals take the necessary care in their operations and, on a broader scale, to promoting a move to industries and alternative substances that minimize the impact on the environment.

A discussion of deterrence is timely as both Ontario and Canada have passed recent legislative amendments that reflect strong deterrence principles and Alberta's courts continue to consider the appropriateness of significant fines. In this context, questions arise about the appropriateness of deterrence measures and whether these measures are producing the outcomes we seek as a society.

### **Increase fines and they will comply**

Two recent legislative amendments appear to strongly support the idea that through increases in the amount of the potential fine (and administrative penalties) one will increase compliance with environmental laws. Make the hammer larger, and potential violators will be deterred.

The Ontario "Spills Bill", Bill 133, *An Act to amend the Environmental Protection Act and the Ontario Water Resources Act in respect of enforcement and other matters*, amends Ontario's environmental protection legislation to allow for significant administrative penalties.<sup>1</sup> The amendments impose a daily maximum administrative penalty of \$100,000 for violations of prescribed sections of both Acts.<sup>2</sup> The administrative penalties are absolute liability offences that expressly exclude the defences of due diligence and mistake of fact.<sup>3</sup> The penalties can be appealed to an Environmental Appeal Tribunal where a reverse onus of the proof of harm has been legislated for prescribed violations, requiring the appellant to prove harm did not occur.<sup>4</sup> The amendments also include increases to the fines available for offences under the *Environmental Protection Act* and the *Ontario Water Resources Act* and set minimum fines in cases of some serious offences.<sup>5</sup> Clause 94 of the Bill also prescribes a duty on director and officers in relation to several oversight factors, including discharges into the environment and reporting.<sup>6</sup> This in turn raises questions of increased standards of care and environmental scrutiny of corporate governance mechanisms.

On the national stage, Bill C-15 received Royal Assent on May 19, 2005 amending the *Migratory Birds Convention Act, 1994 ("MBCA")*.<sup>7</sup> Aimed at ocean dumping of bilge water, the amendments increase the maximum fines available under the *MBCA*. The Bill increases maximum fines for violations of the Act, including dumping substances harmful to migratory birds. For summary conviction offences the maximum fine for individuals goes from \$50,000 to \$100,000 while corporations can face a fine up to \$300,000, where the maximum was formerly \$100,000.<sup>8</sup> Indictable offences see the maximum fines increase from \$100,000 to \$250,000 for individuals and \$250,000 to \$1,000,000 for corporations.<sup>9</sup>

Both Canada and Ontario have taken these legislative steps in a belief that deterrence, by way of the potential for significant fines for environmental harm, will deter non-compliance. For its part Alberta has traveled partially down this road.

### **Alberta penalties**

Alberta's environmental legislation provides fines for up to \$100,000 for an individual and \$1,000,000 for a corporation.<sup>10</sup> No minimum fines are provided in Alberta's legislation. On the administrative penalty front, deterrence measures in Alberta have not taken the more aggressive Ontario approach. In particular Alberta's administrative penalties have a maximum of \$5,000 fine<sup>11</sup> and preclude further prosecution.<sup>12</sup>

### **Fines in the Courts**

The legislative intent behind higher fines and imposition of minimum penalties is clear. However the effectiveness of these fines lies, in part, with the willingness of the judiciary to impose and uphold significant fines for the purpose of deterrence. This is particularly the case when one considers that environmental penalties can have positive tax implications for corporations and, if too small, may be viewed as simply a cost of doing business.<sup>13</sup>

The current judicial appetite for higher fines appears to be mixed in Alberta. The recent case of *R. v. Terroco Industries Limited*, 2005 ABCA 141 ("*Terroco*") upheld an appeal of a lower court judgment that resulted in a significant increase in the amount of the fine ordered under the *Environmental Protection and Enhancement Act*.

Since *Terroco* the Court of Appeal considered the validity of a high fine in relation to wildlife offences in *R. v. Great White Holdings Ltd.*<sup>14</sup> The trial judge in *Great White Holdings* sentenced a corporate and individual defendant to several wildlife offences and related criminal fraud charges. Some of the wildlife offences were sent back prior to the appeal of the sentence, accounting for some reduction of the fine; however the Court went further and reduced the fine by approximately \$86,000.00.

Citing the sentencing principle of totality and the fact that some counts were sent back for retrial, the Court of Appeal removed a discretionary fine (of \$50,000) imposed by the trial judge under s. 93.4 of the *Wildlife Act*<sup>15</sup> and greatly reduced the fine related to the Criminal Code fraud offences.

The Court of Appeal's reliance on the totality principle may, in effect, undermine the deterrence measures that the trial judge apparently thought was required. Indeed, although the Court of Appeal felt the trial judge did not adequately deal with the principle of totality, it appears that the lower court must have been considering it in ordering the significant discretionary fines on top of the wildlife related amounts. In imposing these significant fines the trial judge obviously felt that the wildlife fines themselves were inadequate in their totality, and felt that a significant fine, that would certainly have acted as a general deterrent, was called for.

Indeed, support for the general deterrence principle in sentencing requires the courts to support fines that, at their first instance, appear high. Of course whether the Court of Appeal recognizes this principle cannot be discerned from one case; however, throughout the years there has been some indication that courts have been unwilling to fully support the general idea of deterrence.<sup>16</sup> The Alberta Court of Appeal will soon

have an opportunity to deal with sentencing issues, as an appeal currently pending deals with a significant fine imposed in relation to the illegal trade of a protected fish species under federal legislation.<sup>17</sup>

### Conclusion

Legislation around the country continues to move toward a stricter and more aggressive stance on fines for environmentally related offences. These fines and the legislation that incorporates them reflect an adoption by legislators of the polluter pays principle and a precautionary approach. While industry proponents may continue to criticize stiff environmental penalties, the deterrence mechanisms now being put in place may prove to be a useful tool for promoting compliance, thus minimizing enforcement and prosecution costs. Whether the collateral benefit of promoting the use of more benign substances in particular industries or promoting alternative methods of production will occur remains to be seen.

It also remains to be seen whether the courts will fully support the deterrence principle, while upholding a measure of fairness. This leads to more significant questions of whether our laws should be used to deter particular environmentally unsound practices or commercial endeavours as a whole, and whether the courts should be taking on a role in this regard. One principle of sentencing may include not punishing those with limited assets<sup>18</sup> and yet minimizing fines to allow environmentally unsound companies to continue simply undermines the legislation and our societal goals as a whole.

<sup>1</sup> For a discussion of ticketable offences see article by Elaine Hughes in this issue.

<sup>2</sup> Bill 133, *An Act to amend the Environmental Protection Act and the Ontario Water Resources Act in respect of enforcement and other matters*, 1<sup>st</sup> Sess., 38<sup>th</sup> Legislature, Ontario, 2005, cl. 28 and 52 (Assented to 13 June 2005.) S.O. 2005, c. 12.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, cl. 26.

<sup>5</sup> *Ibid.* at Explanatory Note.

<sup>6</sup> *Supra* note 2 at clause 94.

<sup>7</sup> Bill C-15, *An Act to Amend the Migratory Birds Convention Act 1994 and the Canadian Environmental Protection Act, 1999*, 1<sup>st</sup> Sess., 38<sup>th</sup> Parl., 2005 (assented to 15 May, 2005)

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.* at clause 9(1) replacing s. 13.(1) of the *Migratory Birds Convention Act, 1994*.

<sup>10</sup> *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, at s. 228 (as amended).

<sup>11</sup> *Administrative Penalty Regulation*, A.R. 23/2003 at s.3(3).

<sup>12</sup> *Supra* note 9 at s. 237(3). In contrast, Bill 133 in Ontario provides that prosecution may still occur notwithstanding an administrative penalty being imposed, *supra* note 2 at clause 52.

<sup>13</sup> The cost of doing business argument takes on new meaning where there is relatively little information on true compliance. Violators may be prosecuted for a very small portion of their transgressions, making it very cost effective to continue non-compliance. The offshore dumping of bilge water is often cited as such a scenario, as the incidence of catching violators combined with the relatively low fines of the past may in fact be promoting non-compliance.

<sup>14</sup> 2005 ABCA 188.

<sup>15</sup> R.S.A. 2000, c. W-10 (as amended).

<sup>16</sup> See, for instance, *R. v. Bata Industries Limited* (1995) 127 D.L.R. 438 (Ont. C.A.).

<sup>17</sup> See Environment Canada's media release, dated September 13, 2004, regarding the conviction under the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52, as amended, at [http://www.ec.gc.ca/press/2004/040913\\_n\\_e.htm](http://www.ec.gc.ca/press/2004/040913_n_e.htm).

<sup>18</sup> *Supra* note 13 at para 21.

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## **Regulatory Changes on the Disclosure of Information under EPEA**

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Through a recent regulatory change, Alberta Environment is making a wider range of information and records available under the *Environmental Protection and Enhancement Act (EPEA)*. This information will be available without the need for a formal request under the *Freedom of Information and Protection of Privacy Act (FOIP Act)*.

### **Current requirements**

Currently, section 35(1) of *EPEA* identifies types of information and records that must be disclosed to the public. These include:

- Environmental impact assessment reports;
- Information submitted as part of an application for an approval, registration or certificate of variance;
- Environmental and emissions monitoring data (and processing information needed to interpret the data) provided by an approval holder;
- Any reports or studies provided under the terms and conditions of an approval;
- Statements of concern;
- Notices of appeal;
- Approvals, registrations, certificates of qualification and certificates of variance;
- Remediation and reclamation certificates;
- Enforcement orders; and
- Environmental protection orders.

Additionally, section 237.1 of *EPEA* provides for the public disclosure of enforcement actions such as administrative penalties and prosecutions under the Act.

### **New requirements**

Effective April 1, 2005, under the *Disclosure of Information Regulation*,<sup>1</sup> Alberta Environment will make the following additional types of information available:

- Written warnings;
- A notice of an administrative penalty;
- Specified penalty violation tickets issued under the *Provincial Procedures and Offences Act*, for an offence of *EPEA*;
- Inquiry reports prepared under the *Conservation and Reclamation Regulation* (AR 115/93);
- Records intended as statements of concern;
- Directions of an Inspector or a Director;
- Notice of a decision of a Director;
- Decisions of a Director provided to an applicant, approval holder, registration holder, licensee, preliminary certificate holder or statement of concern filers;
- Any information or records submitted to the Department pursuant to Part 5 (Release of Substances) of *EPEA*;

- Reports and records required under a Code of Practice that are submitted to the Department or to be made available to the Department for inspection upon the Department's request;
- Scientific and/or technical information, studies, reports, and records submitted to the Department pursuant to Part 5 of *EPEA* relating to the environmental condition of a site, including tests and assessments, relating to the delineation or remediation of such sites, or any correspondence between the submitter and the Department pertaining to such information and records;
- Names and addresses of persons consigning, transporting or accepting hazardous waste, the total quantity, or quantity per class, of hazardous waste consigned, transported or received by the facility or person, but not including information linking generators to carriers or receivers of hazardous waste, or information on individual waste stream names, composition and quantity;
- Information or records submitted to the Department that related to an application under *EPEA*, or its regulations, excluding an application for a reclamation certificate;
- Any correspondence from the Department to the applicant relating to the submitted information or records, excluding correspondence relating to an application for a reclamation certificate; and
- Information or records submitted to the Department in accordance with a regulation under *EPEA*, an approval, authorization, notice or direction, and any correspondence from the Department to the submitter relating to the submitted information or records, excluding information or records submitted to the Department and correspondence from the Department relating to the submitted information or records that relate to an application for a reclamation certificate.

### **Retroactive application**

The above information will be publicly available regardless of when the information was submitted to or created by Alberta Environment.<sup>2</sup>

### **Accessing the information**

If the information sought pertains to records submitted for an application or as required through an approval, the requestor must first ask the "appropriate person" (usually the individual or company that submitted the information to Alberta Environment) for the information. If the requestor is unable to obtain the information from the appropriate person within 30 days, or is refused or precluded from contacting the appropriate person, then the requestor can apply to Alberta Environment to make the information available.<sup>3</sup>

Requests for scientific and technical information pertaining to the environmental condition of a site should be directed to the FOIP, Records and Information Management Branch of Alberta Environment (the "FRIM Branch"). The FRIM Branch can be contacted through the Freedom of Information and Protection of Privacy Office of Alberta Environment at (780) 427-4429. A request form for disclosure from the FRIM Branch is available for download on the Alberta Environment website.<sup>4</sup> Most other information should be available from the regional offices of Alberta Environment.<sup>5</sup> The request must be made in writing and contain the name, mailing address and telephone number of the person requesting the information, the details of the document or information being requested, the date on which the request to the appropriate person was made and the

result of that request.<sup>6</sup> The Department will notify the requestor within 30 days of receipt of the request when the information will be released and in what form. The Department may provide a copy of the information, make it available for inspection or publish the information in any form or manner the Director considers appropriate.<sup>7</sup>

Alberta Environment may charge a fee for the release of such information, however, these costs cannot exceed the amounts set out under the *FOIP Regulation*.<sup>8</sup> If the information is available for purchase elsewhere (such as the Queen's Printer), the requestor may be directed to that source.

Information or records concerning any open investigation or enforcement will not be released and neither will information that is subject to a Director's determination in favour of confidentiality under section 35(5) of *EPEA*.

### **General comments**

Greater disclosure of information is a positive step for Alberta Environment. It signals a continued commitment towards openness and transparency in managing the environment and increased public involvement in the environmental decision-making process. Hopefully this will serve as an example for other government departments to make information more readily available to the public.

Although the new regulation reduces the need for *FOIP* requests, certain information will still require a formal request under the *FOIP Act*. For instance, applications or correspondence concerning reclamation certificates are exempt from public disclosure under the new regulation. Reclamation certificates are issued when oil and gas well sites are no longer productive, and the application for the certificate would include information about contamination and remediation efforts at a site. This information may be particularly useful for potential purchasers of property containing older or abandoned oil and gas facilities, so it is not clear why Alberta Environment created exemptions for the disclosure of this information.

Although the costs for retrieving the documents are capped at the amounts listed in the *FOIP Regulation*, these costs may still be prohibitive for some people seeking large volumes of information if it takes a long time to locate and retrieve a record. Further, the new regulation does not include the right to request a fee waiver, as permitted under the *FOIP Act*.<sup>9</sup> It is hoped that Alberta Environment will resolve this problem through its longer term plans to make commonly requested information available on the Internet.

<sup>1</sup> Alta. Reg. 273/2004 [*Disclosure of Information Regulation*]. Ministerial Order 23/2004 identifies the categories of information now available to the public and is it available online: Alberta Environment <[http://www3.gov.ab.ca/env/dept/disclosure/publications/ministerial\\_order\\_23-2004.pdf](http://www3.gov.ab.ca/env/dept/disclosure/publications/ministerial_order_23-2004.pdf)> [Ministerial Order].

<sup>2</sup> Ministerial Order, *ibid.*, s. 1.

<sup>3</sup> *Disclosure of Information Regulation*, *supra* note 1, s. 2(4).

<sup>4</sup> A request form for disclosure from the FRIM Branch is available online: Alberta Environment <<http://www3.gov.ab.ca/env/dept/disclosure/>>.

<sup>5</sup> The regional offices of Alberta Environment are available online: Alberta Environment <<http://www3.gov.ab.ca/env/contact/index.html>>.

<sup>6</sup> *Disclosure of Information Regulation*, *supra* note 1, s. 3.

<sup>7</sup> *Disclosure of Information Regulation*, *ibid.*, s. 2(3).

<sup>8</sup> *Disclosure of Information Regulation, ibid.*, s. 4; *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95, Schedule 2.

<sup>9</sup> *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s.93.

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## Ticketing for Environmental Offences

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### Introduction

In recent years, the cost-effectiveness of enforcement proceedings has been an important policy consideration. At both the federal and provincial level this has led to increased use of administrative monetary penalties as an alternative to prosecution of environmental offenders, since administrative penalties require fewer resources to process and, therefore, can be used more frequently.<sup>1</sup> Because deterrence, and thus prevention of environmental damage, is more strongly associated with the certainty of punishment than it is with the severity of the penalty,<sup>2</sup> any tool which results in a greater capacity to respond to violations is *prima facie* desirable.

However, several federal and provincial environmental statutes contain another type of enforcement tool: the ticket.<sup>3</sup> In brief, a ticketing process is a way of providing for a shorter and more cost-effective criminal procedure than the traditional prosecution. Interestingly, while this tool is available, it appears to be largely unused for pollution violations, despite its potential to contribute to deterrence. This article will provide a brief overview of the ticketing alternative.

### The nature of environmental offences

Environmental offences are regulatory or public welfare offences, not "true crimes." This means that they are civil, not criminal, in substance.<sup>4</sup> As a result, environmental offences, even those requiring *mens rea*, may be enacted by provincial legislatures pursuant to their powers under sections 92 and 92A of the Constitution. In addition, although the federal government may pass criminal laws in relation to environmental matters due to its constitutional jurisdiction over that topic, environmental offences are more commonly regulatory and thus enacted pursuant to the federal government's general power to enforce federal legislation that is otherwise within its valid purview (e.g. fisheries).<sup>5</sup> Nevertheless, regulatory offences are penal law. While their substance is civil, the procedure used for their enforcement is the criminal procedure.

### The process

The normal criminal process has been described as "cumbersome," involving the swearing of an information before a justice of the peace, issuance of an appearance notice, the drafting of charges, court appearances for the entry of pleas, sentencing or trials and, overall, a "substantial and expensive time on the part of the courts, prosecutors and investigators" (and the accused.)<sup>6</sup> Due to the inconvenience and

expense involved, there may be an unwillingness or even inability to devote limited resources to a full prosecution in the case of minor offences. In addition, since a prosecution results in a criminal record, there may be reluctance to create that level of stigma for minor infractions.

Nevertheless, lack of response to violations fosters disrespect for the law and decreases deterrent effects; it is accordingly seen as highly desirable to have some type of "decriminalized" response to wrongdoing which can hold offenders accountable for minor infractions without invoking the entire weight of the criminal law.<sup>7</sup> Ticketing procedures are one response.

A ticketing procedure is intended to "streamline" this process. A familiar example is a traffic ticket; any ticketing procedure for environmental regulatory offences would generally be similar. An enforcement officer responding to a readily provable and minor offence would initiate proceedings by issuing a ticket.<sup>8</sup> There would be no need to swear an information or draft charges. The accused could simply plead guilty by paying a pre-set fine, without a court appearance. However, the option would be given to contest the ticket and obtain a court date and trial. As well, if the accused were non-responsive, the court could convict without hearing oral evidence. Imprisonment would not be an option. It is worth noting that in the context of traffic violations, such ticketing schemes have withstood challenges under the *Canadian Charter of Rights and Freedoms*.<sup>9</sup>

Legislation has been passed to establish ticketing procedures for other public welfare offences, and it would be a relatively simple matter to make more extensive use of these procedures for environmental infractions. Federally, the main statute is the *Contraventions Act*,<sup>10</sup> which has as its stated purpose (s.4) "to provide a procedure for the prosecution of contraventions that reflects the distinction between criminal offences and regulatory offences...and to alter or abolish the consequences in law of being convicted of a contravention, in light of that distinction." It creates a procedure for completion and service of tickets, and a way for accused persons to plead guilty by paying the ticket, make representations regarding the size of fine or need for time to pay, or seek a trial. There are default proceedings if accused persons do not respond. Imprisonment is removed as an option and no criminal record results. Similar statutes exist in several provinces.<sup>11</sup>

### **Usefulness**

In a recent article, news leaked that 56 federal fisheries officers were to be cut from the Central and Arctic regions in the next three years, potentially leaving as few as 6 officers to patrol all of Alberta, Saskatchewan, Manitoba and Ontario. This raises obvious concerns about enforcement capacity, even when coupled with provincial personnel.<sup>12</sup> In such a climate, the benefits of cost-effective enforcement responses through tickets or administrative penalties is enhanced, as the alternative may be a complete lack of enforcement activity, resulting in a lack of deterrence and disrespect for the law.

Despite widespread use of administrative penalties in recent years, the ticketing option remains seemingly underutilized for environmental offenders. The reasons for preferring administrative penalties over tickets are unclear. Both reduce the stigma associated with criminal prosecution, both would result in cost savings based on known information about such systems, and both reduce pressures on the overburdened court system.<sup>13</sup> There is, perhaps, one important distinction. With tickets, the ability to opt for a full

trial arguably provides better protections to those wrongfully accused than does the administrative duty of fairness. As one author noted:

“...[if] enforcement agencies find it too difficult to punish people when they have the protections afforded by courts, this may not be a good reason for using an administrative process. Too often, in past such administrative processes have appeared to be more efficient only because they trampled the rights of people such as small business proprietors who were in no position to expose their abuses by challenging them in the courts.”<sup>14</sup>

On this basis alone, exploring the use of tickets might be a desirable option in environmental cases.

<sup>1</sup> J. Flagal, “AMPs: The Next Logical Step in Environmental Regulatory Law” (1998) 10:3 *Legal Emissions* 7 at 9 reported one Ontario study in which an average prosecution cost \$10,000 while an administrative penalty appeal (which occurs in under 10% of cases) cost about \$1500 to process. Additionally, another study reported that 14 lawyers in one department handled 500 prosecutions per year, while 3 staff in another department handled 800 administrative penalty proceedings.

<sup>2</sup> A. von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Portland, Oregon: Hart, 1999).

<sup>3</sup> See for example: *Fisheries Act*, R.S.C. 1985, c. F-14, s. 79.7 and the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 310.

<sup>4</sup> *R. v Sault St. Marie* [1978] 2 S.C.R. 1299; see generally J. Swaigen, *Regulatory Offences in Canada* (Toronto: Carswell, 1992).

<sup>5</sup> P. Healy, “Statutory Prohibitions and the Regulation of New Reproductive Technologies Under Federal Law in Canada” (1995) 40 *McGill L.J.* 905.

<sup>6</sup> C. Rolfe and L. Nowlan, *Economic Instruments and the Environment: Selected Legal Issues* (Vancouver: WCEL Research Foundation, 1993) at 17.

<sup>7</sup> *Ibid.*; Swaigen, *supra* note 4 at chapter 9; P. Erickson et al., “Backing Into Cannabis Reform” (2004) 17 *Windsor Rev. Legal & Soc. Issues* 9.

<sup>8</sup> Ticketing as a response would normally be applied where required by a compliance policy, such as the CEPA Compliance and Enforcement Policy. S. Berger, *The Prosecution and Defence of Environmental Offences*, Vol. 2 (Aurora: Canada Law Book, looseleaf) at para 7.436.

<sup>9</sup> *R. v Greckol* (1991) 79 *Alta. L.R.* (2d) 272 (Q.B.)

<sup>10</sup> S.C. 1992, c. 47 and the *Contraventions Regulations*, SOR/96-313, as am. This legislation has been used to designate as ticketable certain offences under the *Canadian Environmental Protection Act, 1999*, *supra* note 3; the *Fisheries Act*, *supra* note 3; the *Canada National Parks Act*, S.C. 2000, c. 32; the *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22; the *Canada Wildlife Act*, R.S.C. 1985, c. W-9; the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52; and the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22.

<sup>11</sup> For example, in Alberta see the *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34.

<sup>12</sup> H. Brooymans, “Cutting fisheries officers ‘devastating’” *Edmonton Journal* (May 11, 2005) A6.

<sup>13</sup> Swaigen, *supra* note 4, at chapter 9.

<sup>14</sup> *Ibid.* at p. 236.

Comments on this article may be sent to the editor at [elc@elc.ab.ca](mailto:elc@elc.ab.ca).

## ***Practical Stuff***

### **Why Incorporate as a Society?**

**By James Mallet**  
***Staff Counsel***  
***Environmental Law Centre***

Many environmental and community groups find incorporation useful. In Alberta, the *Societies Act* provides for the incorporation and registration of non-profit groups, and sets out the powers, obligations, and application procedures for Alberta societies.<sup>1</sup>

#### **Advantages**

There are significant advantages to incorporation. A registered society can open a chequing account in the society's name; acquire, own and dispose of real and personal property; and raise or borrow money.<sup>2</sup> Incorporation also provides the group with legal status in civil proceedings, and helps ensure that individuals within the society remain accountable to the group with respect to finances and group activities.

Incorporation also helps ensure a certain continuity in the group. Members come and go, and attitudes and priorities may change. Incorporation requires that the group applying specify the purpose or purposes for which incorporation is desired.<sup>3</sup> Society property and funds can only be used for these purposes. The purposes can only be changed by special resolution of at least 75% of the society's membership.<sup>4</sup>

Incorporation is also an effective way to limit the personal liability of members. Individual members are not liable for any debt or liability of the society.<sup>5</sup> This means that if the society itself is successfully sued, the only funds available to satisfy the claim are the society's. Limiting member liability is particularly important for groups that organize or lead outdoor activities. Incorporation will also normally protect individual members against an award of court costs in litigation involving the society.<sup>6</sup>

#### **Potential liability**

However, it is important to realize that where an individual member is sued for a wrongful action, he or she may be personally liable, in addition to the society. Society membership will not protect from liability an individual who wrongs another. Furthermore, where it can be inferred from the evidence that other members of the group concurred in or consented to a wrongful action, such as defamation, those other members may also be liable.<sup>7</sup> This is true even if the other members were not directly involved in the action that is the basis of the lawsuit.

#### **Incorporation**

Societies operate according to bylaws developed by the group applying for incorporation. The bylaws must address membership, meetings, quorum, voting rights, powers of directors and officers, auditing of the society's accounts, and a number of other matters.<sup>8</sup> The bylaws can also address any other matter relating to the operation of the society. Once the society is registered, the bylaws can only be changed by special resolution of the membership.<sup>9</sup>

Many groups applying for incorporation look to the bylaws of similar, existing societies as a starting point in drafting their own. These are available informally by contacting a member of an existing society or, if necessary, through a registry agent for a fee. To locate a registry agent, see the Alberta Government Services webpage at <<http://www3.gov.ab.ca/gs/>>.

The application process for incorporation is straightforward, and the reporting requirements are minimal. Each year the society must complete and submit an annual report with information on the membership, along with the most recent audited financial statement.<sup>10</sup> The financial statement is generally prepared by the society's treasurer, and itemizes revenues and expenditures. Many society bylaws provide that the required auditing of the financial statement be carried out by two members of the society. Larger societies with more complex accounts may hire an accountant to audit the statement.

### **Charities**

It is important not to confuse registration as a society with registration as a charity under the federal *Income Tax Act*.<sup>11</sup> Registration as a charity allows the organization to issue tax receipts for donations, and opens up funding opportunities from foundations and other grantors, many of whom only support registered charities. Most charities in Alberta are also provincially-registered societies. However, charities must fulfill significant accounting and reporting requirements and a variety of other obligations. Charities must also avoid certain types of political activity. As a result, charitable status is typically either beyond the capacity of, or inappropriate for, most environmental and community groups.

For further information on Alberta societies, application forms, and a link to the *Societies Act*, see the Alberta Government Services *How to Incorporate a Society* webpage at <[http://www3.gov.ab.ca/gs/information/clctc/incorporating\\_societies.cfm](http://www3.gov.ab.ca/gs/information/clctc/incorporating_societies.cfm)>. Regarding registration as a charity under the federal *Income Tax Act*, see the Canada Revenue Agency *Charities Directorate* webpage at <<http://www.cra-arc.gc.ca/tax/charities/>>.

<sup>1</sup> R.S.A. 2000, c. S-14.

<sup>2</sup> *Ibid.*, ss. 17-18.

<sup>3</sup> *Ibid.*, s. 9(2).

<sup>4</sup> *Ibid.*, s. 16.

<sup>5</sup> *Ibid.*, s. 21.

<sup>6</sup> *Friends of the Calgary General Hospital Society v. Canada* (2000), 79 Alta. L.R. (3d) 215 (Q.B.).

<sup>7</sup> *Home Equity Development Inc. et al v. Crow et al.*, (2004) BCSC 124 (B.C.S.C.) at paras. 134-139.

<sup>8</sup> *Supra* note 1, s. 9(4).

<sup>9</sup> *Ibid.*, s. 15.

<sup>10</sup> *Ibid.*, s. 26.

<sup>11</sup> R.S.C. 1985, c. 1 (5th Supp.).

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