News Brief
ENVIRONMENTAL LAW CENTRE

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In This Issue

New Protected Areas Legislation

The Alberta government is expected to introduce legislation in this spring's sitting of the Legislature which would substantially revamp the legal framework for protected areas in the province. Dubbed the *Natural Heritage Act*, the new Act would replace the *Provincial Parks Act*, the *Willmore Wilderness Park Act* and the *Wilderness Areas, Ecological Reserves and Natural Areas Act*.

Critiques of the existing regime have been forthcoming from many quarters, including the Legislation Sub-Committee of the Provincial Co-ordinating Committee of Special Places 2000 and the Environmental Law Centre. The criticisms have had two major focuses:

- The three pieces of legislation were each developed in relative isolation from one another, giving rise to inconsistency and duplication.
- Because so much of the management guidelines respecting the appropriateness of activities are left to regulations and management plans, rather than being set out in the legislation, there is a good deal of confusion among both stakeholders and the general public as to what it means for a site to carry a particular designation. How many people can tell whether a gas plant is permitted in a provincial park?

The *Natural Heritage Act* would address these concerns by the prescription of a menu of five types of designations, designed to complement one another. Each legislated category would carry an explicit purpose statement stating what goal(s) are to be achieved by a site bearing that name. These purpose statements aid in understanding by both administrators and the public, and will be a useful tool for judicial consideration of the new provisions. In four of the five categories, the maintenance of ecological integrity and the preservation of biological diversity are referred to as the foremost goals. The fifth is aimed primarily at recreational needs.

The proposed legislation would back up these purpose statements with clear pronouncements of what activities were consistent with each given designation. In the four designations aimed primarily at preservation, new surface dispositions for purposes of industrial development would be explicitly banned, and new sub-surface dispositions would carry a caution that no surface access could be expected. Commercial timber operations (sustained yield timber harvesting) would likewise be banned in areas designated for protection.

One of the categories, Recreation Areas, would focus primarily upon the creation of outdoor recreational opportunities of many kinds. In more protective designations, recreational opportunities would mainly be allowed, but particular activities, such as off-highway vehicle use, would be restricted or prohibited.

The *Natural Heritage Act* is bound to generate a good deal of public interest and debate. To some extent, these will focus on the loss of one old category and the creation of a wholly new one.

The designation being lost is that of Wilderness Areas. Under the new proposal, the three existing wilderness

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areas would be rolled into the new Wildland Provincial Parks category, though with an assurance that their prior management guidelines would be maintained. Whether this is sufficient to maintain the protection these areas have enjoyed is very much open to doubt. This is a critical issue in that two of the three existing wilderness areas, the White Goat and Siffleur, are surrounded by the Bighorn Wildland Recreation Area. A Local Committee for that area, established through the Special Places Programme, has failed to recommend any substantive steps for the preservation of the area, potentially exposing the wilderness areas to a higher level of risk due to easier access and more intensive use.

The new designation is a novel attempt to marry the traditional land management techniques of many in Alberta's ranching community with the protection of our grasslands from industrial development and intensive recreation. Heritage Rangelands would be areas of "native rangelands designated and managed to ensure lasting ecological integrity and preservation of biological diversity using livestock grazing as the primary management tool".

David W. Poulton
Tousignant Young

EPEA Admin Penalties

The following administrative penalties were issued under the *Environmental Protection and Enhancement Act* since the last issue of *News Brief:*

- for failure to submit the required beverage container volume reports within the timeframe specified by the approval to operate... $1,000. each, were to G. Jobson operating as B.M.D. Bottle Depot at Hines Creek and H. McKay, Wabamun Bottle Depot.
- $9,000. to the River Bend Hutterian Brethren for operating a sand and gravel pit without an approval contrary to s.59 of the *Environmental Protection and Enhancement Act.*
- $2,000. to Ross Agri-Supplies (Camrose) Inc. for failing to thoroughly rinse their spray tanks between pesticide applications resulting in crop damage to the next field in which the spray unit was used contrary to AR 126/93, s.5(1)(b).
- $3,500. to Alberta Oil and Gas Petroleum Corp. operating in the M.D. of Brazeau No. 77 for failing to submit five monthly air quality monitoring reports within the required timeframe in violation of s.213(e) of the *Environmental Protection and Enhancement Act.*
- $13,500. to Tiger Resources Technology Inc. of Calgary for the release of hydrogen sulphide and sulphur dioxide in excess of their approval limits and from an unapproved emissions source contrary to s.213(e) of the *Environmental Protection and Enhancement Act.*
- of $2,000. to Geon Canada Inc. of Strathcona County for failing to obtain and analyze a daily composite sample of industrial wastewater as required by their Approval contrary to s. 213(e) of the *Environmental Protection and Enhancement Act.*

READER VIEWS

Do you agree or disagree with any points of view in *News Brief*? If so, then write down your thoughts and pass them on to the *News Brief* Editor for publication in an upcoming issue. To be published, all letters must be signed and they may be edited for length.

The Editors

By Jillian Flett, *Alberta Environmental Protection*

Director's Letters Not Subject to Appeal

Legal Oil and Gas Ltd. v. Director of Land Reclamation Division
(22 December 1997), # 97-024 (EAB)

A recent decision of the Environmental Appeal Board (EAB) considered whether a letter from the Director relating to an order was appealable as an amendment to the order. The order had required the company to submit a proposed plan of action. The subsequent letter issued after a Departmental review of the proposed plan, further clarified the requirements in the plan and how the activity should be undertaken. This practice is necessary because in many situations the company has the most knowledge about their facility and is able to determine the best way to carry out the activity required in the order. The Director is then able to provide specific clarification to ensure the order is met based on the company's submission. The EAB decision is important because it found that the clarification letter is not an amendment to the order and therefore does not trigger a new appeal period.

In the case under appeal, the Director had issued an Environmental Protection Order (EPO) to Legal Oil and Gas Ltd. (Legal) after inspectors discovered that substances had been released from their operation at 2 well sites and that the substances had caused an adverse effect to the environment. An amendment to the EPO was issued on December 23, 1996. Legal submitted a reclamation plan to the Director in April, 1997. In response to the reclamation plan, the Director sent detailed letters dated May 14 and June 4, 1997 which clarified the details required in the reclamation plan.

On June 11, 1997, approximately 6 months after the amended EPO had been issued, Legal filed an appeal with the EAB appealing the decision of the Director in the letters of May 14 and June 4, 1997. Legal claimed that the letters made unreasonable requests and had the effect of amending the EPO. They also claimed that they were not the "person responsible" for the contamination.

The Appellant argued that they did not appeal the original EPO when it was issued because they did not understand the degree and extent of the contamination at the site at that time. They also argued that even though the letters did not have the form of an order, since they were very specific and used the word "shall", they were amendments to the EPO.

The Director argued that the original EPO established a fixed liability for contamination with the Appellant. The EPO was intended to provide sufficient flexibility to allow the Director and Appellant to respond to the findings of the subsequent activities undertaken at the site. Since the original EPO fixed liability, the EAB had no jurisdiction to hear an appeal approximately 16 months later. The letters did not amend the issue of Appellant's liability, they only clarified, within the terms of the original EPO, the liability assigned by the original order.

In its decision the EAB noted that both the EPO and the amended EPO have an explicit structure. The letters contained specific requests and directives. All the matters addressed in the letters fit reasonably under the clauses of the EPO. The letters had neither the form nor substance of an amendment to the EPO. The minor issues raised in the letters did not warrant a review of jurisdiction by the EAB.

The EAB also considered Legal's request to waive the deadlines for filing a notice of objection because of the following alleged extenuating circumstances:

- the complexity of the issue of contamination of the site due to the previous owner's potential liability,
- the Appellant's argument that they were not a "person responsible" and therefore, the EPO was invalid,
- the Appellant's argument that since they were no longer the well licensee they should not be subject to an EPO,
- the Appellant's argument that a reclamation certificate was issued in 1963 in respect of the southern portion of the site thereby invalidating the EPO.

The EAB did not accept any of these factors as grounds to extend the timelines for filing a notice of objection. The EAB stated that it would have considered extending the deadline if the letters had raised a new liability issue which had not been adequately explained in the original EPO. This was not the case in the case under appeal. Since there was no basis to exercise its discretion to extend the timelines for filing the notice of object, the appeal was dismissed.

In Progress

In the Legislature...

Federal Legislation

Bill C-29, *An Act to establish the Canadian Parks Agency and to amend other Acts as a consequence* was introduced by the Minister of Canadian Heritage and read the first time, February 5, 1998...

The Canadian Council of Ministers of the Environment announced the signing of *A Canada-Wide Accord on Environmental Harmonization* and three of its sub-agreements. The three sub-agreements deal with environmental inspections, assessments, and standards. It is anticipated that seven additional sub-agreements will be developed over the next three years. The Accord was signed by the federal, provincial, and territorial governments with the exception of Quebec...

Alberta Legislation

Bill 6, the *Dangerous Goods Transportation and Handling Act* was introduced February 3, 1998 and amended and passed at Committee of the Whole, February 11, 1998. The primary purpose of this Bill is to bring the provincial statute in line with the federal statute. It will replace the *Transportation of Dangerous Goods Control Act*...

Federal Regulations

An *Order Adding a Substance to the List of Toxic Substances in Schedule I to the Canadian Environmental Protection Act* and the *Benzene in Gasoline Regulations*, under the *Canadian Environmental Protection Act*, came into force November 6, 1997. (*Canada Gazette Part II*, November 26, 1997, pp. 3146-3186)...

The Minister of the Environment has tabled in the House of Commons, new procedural guidelines for public review panels, which are designed to improve the efficiency and effectiveness of environmental assessments, by establishing mandatory timelines of 396 days (maximum of 441) for the review of a project from referral to the submission of the final report. *Procedures for an Assessment by a Review Panel* is published as a ministerial guideline pursuant to section 58 of the *Canadian Environmental Assessment Act*. The guideline can be accessed on the website http://www.ceaa.gc.ca...

The Minister of the Environment has repealed the Non-domestic Substances List made on January 26, 1991 and compiled a replacement list. (*Supplement Canada Gazette Part I*, January 31, 1998, pp. 1-83). The *Domestic Substances List* has been amended as of December 5 and 11, 1997. (*Canada Gazette Part II*, December 24, 1997, pp. 3530-3532, 3634-3635).

Cases and Enforcement Action...

A decision released by the Federal Court of Canada in the *Alberta Wilderness Association et al.* v. *Minister of Fisheries and Oceans et al.* denied the Respondents' motion to strike the application of the Alberta Wilderness Association. The AWA applied for judicial review of the Cheviot mine decision...

The Court of Queen's Bench of Alberta released a decision November 27, 1997 in *Nurani* v. *Environmental Appeal Board*. Being considered was a request for an Order prohibiting the EAB from reconsidering its Report and Recommendations and from hearing the submissions of Intervenors. The Court denied the request for an Order and the EAB subsequently decided to proceed with a new hearing...

December 8, 1997 the Court of Queen's Bench of Alberta released a decision in *Haig* v. *The City of Lethbridge*. The case concerned the sale of land by the City to a Taiwanese corporation to develop a hog processing facility on the land. The Justice ruled the City had the authority to enter the Agreement, that the Agreement was valid, and that the By-law related to the sale should be upheld...

The Alberta Environmental Appeal Board released its Report and Recommendations in the following matters:

- In *Nelson* v. *Inspector of Land Reclamation Division, Alberta Environmental Protection*, an appeal of a reclamation certificate, the EAB upheld the issuing of the certificate and recommended the appeal be dismissed. It granted party status to the Alberta Surface Rights Federation because the Appellant had specifically requested they be allowed to present evidence, but limited the Federation's involvement to presenting evidence only and not to cross-examine other parties or be cross-examined.

- In *Danadam Consulting Incorporated* v. *Director of Chemicals Assessment and Management Division, Alberta Environmental Protection*, an appeal of an Approval issued for the operation of a Beverage Container Depot, the Board dismissed the appeal ruling the Appellant was not "directly affected".

- In *Rivard* v. *Director of Northeast Boreal and Parkland Regions, Alberta Environmental Protection*, an appeal concerned an Amending Approval issued to the Town of Bonnyville for construction of a wastewater storage cell and groundwater monitoring wells for the town's wastewater system, resolution was reached at a mediation meeting with the result that the Board recommended the Amending Approval be subject to the conditions specified in the Resolution.

■ **Howard Samoil**, *Staff Counsel*
Dolores Noga, *Librarian*
Environmental Law Centre

Bankruptcy And Insolvency Amendments Affect Environmental Liability Of Trustees And Receivers

Long-awaited amendments to the federal *Bankruptcy and Insolvency Act* (BIA) came into effect September 30, 1997.[1] Certain of these amendments, which add subsections (1.1) - (8) to s.14.06 BIA, affect the potential personal environmental liability of trustees in bankruptcy and receivers in receiverships ("trustee/receiver").[2]

Limitations On Liability

Most significantly, the amendments modify previous limitations of potential environmental liability for the trustee/receiver. Section 14.06(2) BIA now limits the personal liability of the trustee/receiver for environmental conditions or damage that either

(1) occurred before the trustee/receiver's appointment, or

(2) occurred after the trustee/receiver's appointment, unless the condition or damage arose as a result of gross negligence or wilful misconduct on the part of the trustee/receiver.

This provision creates a new standard to be applied in determining the possible environmental liability of a trustee/receiver for post-appointment occurrences or damage. The previous version of s.14.06(2) BIA allowed for personal liability of a trustee for environmental conditions or damage that occurred after its appointment where it failed to exercise due diligence. It is also of note that s.14.06(1.1) BIA now explicitly indicates that the provisions of s.14.06(1)-(6) BIA apply to receivers in receiverships, as well as trustees in bankruptcies. This was not clear in the previous version of s.14.06.

In the Alberta context, the new version of s.14.06(2) BIA effectively nullifies the application of sections 226(3)-(4) of the *Environmental Protection and Enhancement Act* (EPEA) to trustees in bankruptcy and receivers, as s.14.06(2) specifically overrides other federal or provincial legislation. Section 226(3) EPEA sets out a limitation of liability for parties acting in a representative capacity, including trustees in bankruptcy and receivers, with respect to environmental protection orders issued in relation to contaminated sites under section 114 EPEA. Section 226(4) EPEA creates an exception to that limitation in circumstances where the representative contributes to further accumulation or continued release of a substance upon becoming aware of the substance's presence at the contaminated site. The new BIA provisions establish a more stringent standard to be met by regulators seeking to impose liability on trustees and receivers for environmental conditions or damage Regulators at Alberta Environmental Protection are aware of this effect of s.14.06(2) BIA, and hopefully will consider remedying the inconsistencies when amendments are next made to EPEA.

Section 14.06(4) BIA also provides the trustee/receiver with an exemption from personal liability arising from orders that would have the effect of requiring it to remedy environmental conditions or damage affecting property included in a bankruptcy or receivership. The trustee/receiver is protected from personal liability for failure to comply with such an order and for costs incurred in carrying out such an order, if certain conditions are met. For the exemption to apply, the trustee/receiver must either

(1) comply with the order within time limits specified in section 14.06(4) BIA,

(2) abandon, dispose of or release any interest in the affected property with notice to the regulator that issued the order, within time limits specified in section 14.06(4) BIA, or

(3) have abandoned, renounced or divested itself of any interest in any affected property before the order was made.

This exemption from liability will apply in the provincial context specifically to situations in which orders are issued under provincial legislation such as EPEA directing a trustee/receiver to undertake remedial action. As indicated, the trustee/receiver must choose to either comply with the order or release the property from the bankruptcy or receivership. This is of some advantage to environmental regulators, as practically it should ensure that properties affected by environmental conditions or damages are not held in an insolvency limbo as has occurred previously in some cases.

It is arguable that this exemption from personal liability created in s.14.06(4) BIA will not protect a trustee/receiver in a situation requiring remediation of contamination that has migrated off-site to property not owned by the debtor, as subsection (4) refers to "any environmental conditions or environmental damage *affecting property involved in a bankruptcy, proposal or receivership...*" (emphasis added). However, this may be a moot point in most instances given the broad limitation of liability granted to a trustee/receiver under s.14.06(2) BIA.

Trustees and receivers are also provided with the same exemption from liability under section 14.06(4) BIA for such orders during the time period that an order is subject to a stay for the purposes of the trustee/receiver either

(1) challenging the validity of the order, or

(2) assessing the economic viability of complying with the order.

This limitation of liability goes hand in hand with the stated purpose of such a stay and is reasonable in the circumstances.

Duty To Report/Disclose

It is important to note that s.14.06(3) BIA specifically provides that the limitation of personal liability under subsection 14.06(2) does not relieve a trustee/receiver from federal and provincial statutory obligations to report or disclose information. As such,

(Continued on page 6)

(Bankruptcy and Insolvency Amendments...cont'd from page 5)

s.99 EPEA which imposes a duty to report substance releases, and approval conditions requiring submission of reports and disclosure of specific information, will still be applicable to trustees and receivers, particularly in instances where they take control of and operate the environmentally regulated business of a debtor.

Stays Of Orders

Section 14.06(5) BIA provides the ability for courts to issue a stay of an order directed to a trustee/receiver requiring action regarding environmental conditions or damage on property affected by a bankruptcy or receivership. This type of stay may be applied for by a trustee/receiver to provide it with an opportunity to assess the economic viability of complying with the order. The notice of application for the stay (including matters of timing and parties to be given notice) and the length of the stay are matters which are within the court's discretion to determine. Section 14.06(4) BIA specifically protects the trustee/receiver from personal liability for failing to comply with the order during this stay.

This form of stay could have significant implications for environmental regulators. One concern is that the granting of a stay may delay the enforcement or remediation process with respect to environmental conditions or damage, as it is not clear from section 14.06(5) BIA whether this form of stay would operate to stay the order only as against the trustee/receiver, or as against all parties to whom the order is directed. In instances where there may be an order against a number of parties including a trustee/receiver, for example under section 114 EPEA, it may be prudent for environmental regulators to issue a separate order to the trustee/receiver, to enable matters to proceed with respect to other parties if a BIA stay is obtained by the trustee/receiver. Another concern is that the notice requirements for a BIA stay rest wholly within the court's discretion, and may vary greatly from case to case.

Recovery Of Remediation Costs

Of interest in the new BIA amendments is section 14.06(7), which provides the federal and provincial governments with a first charge for recovery of costs of remedying environmental conditions or damage. This first charge applies to land that was remediated and belongs to a debtor in bankruptcy or receivership, and any other land belonging to that debtor that is contiguous to the remediated property and is related to the activity that caused the environmental conditions or damage. The creation of this first charge should assist environmental regulators in recovering remediation costs incurred by government, and goes beyond the cost recovery tools currently available to the province under EPEA.

Transition

It should be noted that these new BIA provisions (section 14.06(1.1)-(8)) only apply to bankruptcies and receiverships in which proceedings have been commenced after the amendments came into effect. Thus, only trustees and receivers in matters in which proceedings were commenced after September 30, 1997 will have the specific limitations of environmental liability provided by these amendments. Trustees and receivers in matters that were commenced prior to that date are subject to the limitations of liability set out in section 226 EPEA (discussed above) and the previous section 14.06(2) BIA, which refers to failure of a trustee/receiver to exercise due diligence.

■ **Cindy Chiasson**
Staff Counsel
Environmental Law Centre

1. S.C. 1997, c.12
2. Readers should keep in mind that a trustee/receiver can be held personally liable for acts beyond the scope of its appointment and could be required to pay that liability from its own funds, rather than from the funds recovered or generated due to the bankruptcy or receivership.

Public Lands and Forests Admin Penalties

The following administrative penalties were issued under the *Public Lands Act* and *Forests Act* since the last issue of *News Brief*.

- $3,000. and $3,500 to Weyerhaeuser Canada Ltd. operating at Grande Cache and Grande Prairie respectively, for damage to water courses contrary to s.100(i)(ii) of the *Timber Management Regulation*.
- $2,500. to Chawn Bozak of Barrhead for unmanufactured timber harvest contrary to s.100(a)&(b) of the *Timber Management Regulation*.
- $1,000. to Gavin Anderson of Winterburn for noncompliance with the terms of a grazing lease contrary to s.47(1) of the *Public Lands Act*.
- $99. to Euclide Bisson of McLennan for unauthorized use of public land contrary to s.47 of the *Public Lands Act*.
- $2,250. to Rossman Industries Ltd. of Camp Creek for inaccurate timber records in violation of s.112(1)&(2) of the *Timber Management Regulation*.
- $300. to North Central Timber Association of Flatbush for high stumps in the cut block contrary to s.100 of the *Timber Management Regulation*.
- $500. to Bearspaw Petroleum Ltd. of Calgary for contravention of the terms and conditions of their licence of occupation contrary to s.47.1(1) of the *Public Lands Act*.
- for contravention of operating conditions contrary to s.100(b) of the *Timber Management Regulations*, $500. and $300. to High Level Forest Products Ltd. of High Level.

Action Update

Alberta's Fisheries Act – Old Wine in a New Bottle?

On November 1, 1997, the *Fisheries (Alberta) Act*, which was assented to June 26, 1992, was proclaimed in force. The Act provides the mechanism whereby the Government of Alberta may enter into agreements with the Government of Canada with respect to the licensing and management of fisheries in Alberta, providing for the administration of the *Fisheries Act (Canada)*, and providing for the promotion, processing, control and regulation of marketing of fish within Alberta. The Act also provides for the appointment of the Freshwater Fish Marketing Corporation, established under *the Freshwater Fish Marketing Act (Canada)* as the exclusive purchaser and distributor of fish in the province.

The *Fish Marketing Act* is repealed and the elements of the system which regulates the commercial distribution and marketing of freshwater fish incorporated into the new Act. It provides for the issuance of licenses for sportfishing, commercial fishing, fish research and for the culture of fish. The Act authorizes the appointment of fishery officers and guardians for the purposes of administering the Act, with arrest, search and seizure powers. Vendors and shippers of fish are required to maintain records of transactions including the quantity by weight of each fish species and the lake of origin, and to submit them to the Minister or make them available for inspection when requested. The Act also provides the Minister with the powers to deal with disease and parasite problems which might present a danger to the health of any fish, animal or person. These powers include seizure or quarantining of suspect fish and affected equipment, and the prevention of the discharge of water from the affected location.

The coming into force of this Act, five years after its passage, helps to establish the legally correct framework for the province to administer the delegated provisions of the *Fisheries Act (Canada)* as well as to consolidate the authority necessary to administer and manage those matters associated with fisheries that are within provincial jurisdiction.

■ **Howard Samoil**
Staff Counsel
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CONFERENCE ANNOUNCEMENT

A Legacy of Land: Conservation Easements And Land Stewardship

June 18 – 19, 1998
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A joint endeavour of the **Environmental Law Centre** and the **Land Stewardship Centre**, this innovative private conservancy conference will provide much needed information on protecting natural landscapes.

The **Environmental Law Centre** workshops will explore many legal and legally related aspects of conservation easements including drafting conservation easements, tax consequences, estate planning, appraisals and uses for municipalities.

The **Land Stewardship Centre** workshops will investigate practical aspects including land stewardship skills critical to appreciating, identifying, maintaining and monitoring natural areas.

For further information contact the Environmental Law Centre.

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Case Notes

Request for Information and the Litigation Privilege

In a recent decision[1], the Alberta Information and Privacy Commissioner was required to explore the circumstances in which the litigation privilege will apply so as to protect from disclosure documents which have come into the hands of the Department of Alberta Environmental Protection.

The Applicant was counsel for several landowners who had brought civil actions against the owners of nearby service stations, alleging that the Plaintiffs' lands had been contaminated by leaking underground storage tanks situated on the service station properties. The documents in question were copies of reports which had been prepared by consultants for the service station owners and provided to the Department. At least some of the documents pre-dated the commencement of the actions.

Section 26 (1) (a) of the *Freedom of Information and Privacy Act*[2] provides that the head of a public body may refuse to disclose "information that is subject to any type of legal privilege, including solicitor-client privilege...". Such disclosure *must* be refused if the privilege belongs to a person other than the public body. The Department had turned down the request for information as it related to these reports on the ground that the reports were protected by the litigation privilege. In his decision the Commissioner reviewed the rules relating to this type of privilege. The essential requirements are that the communication must be intended to be confidential, and that the dominant purpose for the document's preparation must be for the use of counsel for use in litigation, either existing or reasonably anticipated. The service station owners, supported by the Department, argued that litigation had been in their reasonable contemplation as soon as the Department informed them of the complaints by neighbouring landowners and requested preliminary site assessments.

The Commissioner accepted that all of the documents "were protected by the litigation privilege". In reaching this conclusion, he relied upon *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Ltd.*,[3] a case in which the Alberta Court of Appeal had held that, once the Director of Investigation and Research had launched an inquiry under the *Combines Investigation Act*, "litigation was anticipated and, indeed, was then in progress".

The Commissioner's decision appears to go somewhat beyond the holding in the *Ed Miller Sales* case. In that case the combines inquiry had been commenced for the specific purpose of determining whether an offence had been committed. At the hearing before the Commissioner, the Department of Environmental Protection gave evidence that, after it receives a complaint, it visits the site then decides whether there is justification to proceed with further action. It is true that, in certain circumstances (e.g. where it turns out that a property owner has "knowingly" released substances into the environment at a level which may cause a significant adverse effect), prosecution is a possibility. The Department, however, has a number of enforcement options available to it; given these various options and the conditions which must be present to lead to a prosecution, it may be somewhat unrealistic to say that prosecution is contemplated as soon as the Department starts looking into a matter such as this.

There is a further aspect of the decision which is open to question. The litigation privilege requires the document to have been prepared, as its "dominant purpose", *for the use of counsel* in the litigation. This is a requirement which it is easy to lose sight of, especially since the courts and the commentators, in describing the requirement, frequently make use of shorthand phrases such as "for the dominant purpose of reasonably contemplated litigation". It is not apparent from the Commissioner's decision whether the use of the site assessments by counsel was even one of the purposes for which those documents had been ordered.

Quite aside from the policy rationale underlying the litigation privilege, there may be public policy considerations which make it desirable to restrict public access to departmental copies of documents such as the site assessments in this case. In order to be effective at its job, the Department naturally wishes to encourage co-operation and frankness on the part of the owners of potentially contaminated sites. Such co-operation may be discouraged if documents such as site assessments become open to the public as soon as they are provided to the Department. Nonetheless, countervailing public policy considerations (i.e. those favouring disclosure) obviously exist as well, and the scheme of the Act does not recognize a general polluter-Department privilege.

Aside from his holding on the litigation privilege, the Commissioner's decision dealt with a number of other interesting points. Among these were the following:

- The standard of procedural fairness which applies to inquiries under the *Freedom of Information and Privacy Act* was addressed.
- The Commissioner held that he, and not only the courts, has jurisdiction to deal with issues of privilege in matters under litigation.
- Section 23(1)(a) of the Act (which entitles the public body to refuse disclosure which could reasonably be expected to reveal intergovernmental advice, proposals, recommendations, analyses or policy options) was held not to apply to a number of departmental documents such as "briefing notes" which the Department had refused to release. This is not the first case in which the Commissioner has found the Department of Environmental Protection to have placed excessive reliance on s. 23(1)(a).[4]
- Section 31 of the Act was held not to apply. That section requires a public body, "without delay", and notwithstanding any other provision of the Act, to disclose:

(Continued on page 9)

(Request for Information... continued from page 8)

(a) information about a risk of significant harm to the environment or to the health or safety of the public or a group of people; or

(b) information the disclosure of which is, for any other reason, clearly in the public interest.

As in previous decisions,[5] the Commissioner gave a narrow scope to this provision, holding that it applies only in "emergency-like" circumstances. These, he held, could not have existed in the case before him because the Department had known about the condition of the service stations two years before the Act came into force.

- Finally, the Commissioner briefly touched on whether section 33(9) of the *Environmental Protection and Enhancement Act* applied to prohibit the release of the documents to the Applicant. Section 33(9) provides that certain information, which is normally to be made available to the public under subsections 33(1) and (3) (such as approvals, reclamation certificates and environmental protection orders) may not be released under those subsections where the "matter ... is the subject of an investigation or proceeding under this Act". The Commissioner did not find it necessary to decide whether section 33(9) applied, in part because that provision had only been given paramountcy over the *Freedom of Information* and *Privacy Act* after the hearing before him.[6] The interplay between the respective disclosure provisions in the two Acts must therefore await clarification in future decisions.

■ **Paul Edwards**
Ballem MacInnes

1. Alberta Order 97-009 (28 October 1997) Review Nos. 1177, 1178 and 1179 (A.I.P.C.).
2. S.A. 1994, c. F-18.5.
3. (1988), 61 Alta. L.R. (2d) 319.
4. See Alberta Order 97-007 (12 May 1997), Review No. 1087 (A.I.P.C.), discussed in *News Brief*, Vol. 12 No. 2. 1997 at 2.
5. See Alberta Order 96-011 (13 September 1996), Review No. 1115 (A.I.P.C.), also discussed in *News Brief*, Vol. 12, No. 2. 1997 at 1.
6. By Alta Reg. 182/97, s.4. enacted pursuant to s.5(2) of the *Freedom of Information and Privacy Act*.

EAB Costs Update

Zon v. *Director of Air and Water Approvals Division* (22 December 1997) #97-005 - 97-015 Cost Decision (EAB)
Ash v. *Director of Southern East Slopes and Prairie Regions* (5 February 1998) #97-032 Cost Decision (EAB)

The Zon Decision

In this case, three appellants sought to recover final costs in the appeal of the approval for TransAlta Utilities' Wabamun thermal electric power plant. The EAB reinforced its position from *Kozdrowski*[1] that the general civil litigation rule of "loser pays" is not relevant to its hearings, but chose not to award costs to any of the appellants. It held that all parties, including the Director and TransAlta Utilities, had made an equally substantial contribution to the appeal, and further found that all parties contributed equally to serving the public interest by furthering the goals of the *Environmental Protection and Enhancement Act* and assisting the Board in its interpretation of the legislation.

The Ash Decision

The EAB, in the *Ash* case, issued reasons for its denial of a third request by the individual appellant for interim costs on an appeal of two approvals issued to the City of Calgary for pesticide use within 30 horizontal metres of an open body of water. Interim costs were sought for an expert report on the pesticides in question and their effects.

The EAB indicated that applicants for interim costs bear the burden of proof to show that the costs are *necessary* for the preparation and presentation of the submissions at appeal. This "necessary" standard includes the requirement under section 18(1) of the *Environmental Appeal Board Regulation* that the costs be *directly and primarily related* to the preparation and presentation of the submission. The Board elaborated on the requirements an applicant should meet to satisfy the burden of proof, and implied that the discretionary factors in section 19(3) of the *Environmental Appeal Board Regulation* **must** be met. As well, the Board set out procedural guidelines for interim costs applications related to form and timing.

Effects of the Decisions

Although there is merit in the EAB's clarification of procedural and evidentiary requirements for costs applications, the effect of both decisions may be to cast a chill on applications for costs, and perhaps on appeals by members of the public as well. The Board's strong language throughout the *Ash* decision seems to contradict its statement in the conclusion that the decision is not intended to place "an appeal's worth of effort on interim costs applicants". The substantive requirements of the *Ash* decision now place a significant burden on applicants for interim costs in terms of preparation and additional costs. As well, an increase in procedural requirements seems to work as an obstacle to the EAB's objective, stated in *Kozdrowski*, of promoting lay presentations at appeals.

The *Zon* decision may have a similar effect in discouraging applications for costs or appeals by giving the impression that appellants who are members of the public must make a contribution that is much more "substantial and relevant" than other parties in order to qualify for an award of costs. Given the adversarial nature of EAB proceedings, it is puzzling indeed that the Board has found in *Zon* that parties other than the public appellants have represented the public's interests so well as to preclude the applications for costs by those members of the public.

■ **Cindy Chiasson**
Staff Counsel
Environmental Law Centre

1. See *News Brief*, Vol. 12, No.3, 1997 at 6.

EAB Attempt To Limit Appeal's Scope Held Unfair

Chalifoux v. *Environmental Appeal Board (Alberta)* (2 October 1997) Edmonton #9703-15182 (Alta. Q.B.)

The *Chalifoux* decision arises out of lengthy proceedings related to a renewed approval granted to Chem-Security for the Alberta Special Waste Treatment Centre near Swan Hills, Alberta. The approval was appealed to the Environmental Appeal Board ("EAB"). Since that time, this matter has been before the Court of Queen's Bench twice and the Court of Appeal once on procedural questions related to the scope of the appeal.

The history of this matter is relevant. The EAB issued a preliminary decision in June, 1996, identifying the issues of fugitive PCB emissions and off-site surface run-off as matters to be reviewed in the appeal. The EAB found that the Natural Resources Conservation Board ("NRCB") did not deal with these matters in previous hearings on the Treatment Centre. Chem-Security unsuccessfully sought judicial review in the Court of Queen's Bench[1] of the inclusion of fugitive PCB emissions in the appeal, based on the prior NRCB hearings, and then appealed that decision to the Court of Appeal. Chalifoux's ongoing position has been that the current evidence is drastically different from that presented at the NRCB hearings, thus making fugitive PCB emissions a new matter to be considered by the EAB.

The Court of Appeal dismissed the appeal and directed the EAB to hold a hearing. It held that Chem-Security's application for judicial review was premature, and Justice Berger stated:

> The unfolding of the narrative and the evidentiary underpinnings will, arguably, determine whether the application to dismiss the notice of objection pursuant to section 87(5) will or will not succeed.

The Court indicated that the EAB would require more complete evidence to determine whether the notice of objection (or particular issues raised by it) should be dismissed. The EAB's decision on the matters to be heard was held to be a preliminary ruling on an application to dismiss the notice of objection. It was further noted that once more or all of the evidence was placed before the EAB, the application to dismiss the notice of objection could be renewed and the matter revisited by the Board.

Based on the Court of Appeal's decision, counsel for Chalifoux asked the EAB in July, 1997 to reconsider its decision on the appeal's scope and the applicability of section 87(5)(b)(i) EPEA. Counsel for both Chem-Security and the Director of Chemicals Assessment and Management provided responses to the EAB. In early August, 1997, the EAB sent a letter to all parties indicating its decision to limit the appeal's scope to fugitive PCB emissions and off-site discharge of surface water, which was consistent with its initial decision in July 1996. It stated that it had made this decision pursuant to section 87(2) EPEA; however, Chalifoux's request and the parties' submissions had been made in relation to the application of section 87(5)(b)(i) EPEA. Counsel for Chalifoux sought to have the decision quashed by the Court of Queen's Bench on the basis that they were not provided with an opportunity to make submissions in relation to section 87(2), and were not aware of any arguments advanced by the other parties in relation to that provision.

Justice Wilson quashed the decision on the ground that the Board had lost jurisdiction by not allowing Chalifoux an opportunity to put forward his case on the request made for reconsideration of the appeal's scope. The Court held that the manner in which the EAB proceeded was unfair, particularly because Chalifoux was not given an opportunity to reply to the submissions made by other parties and by the EAB. Justice Wilson referred in particular to *Inuit Tapirisat of Canada v. Canada (National Energy Board)*[2] which specifically provides that a ruling made in the course of a proceeding may be quashed if it amounts to an error of jurisdiction, and further stated that a denial of natural justice or a fair hearing is an error of jurisdiction.

The decisions in this matter may have implications beyond the immediate case. In the future, we could see the development of mini-hearings or reviews within the larger appeal to determine the scope of matters before the Board, as it is clear that all parties to the appeal must be given full opportunity to make and reply to submissions. The courts seem to be moving towards imposing a duty of fairness on the Board with respect to all steps of its process, including determinations that it makes as a result of written submissions.

■ **Cindy Chiasson**
Staff Counsel
Environmental Law Centre

1. See *News Brief*, Vol. 11, No. 4 at 9.
2. 2 November 1981, #T-5156-81, F.C.T.D.

By Andrew R. Hudson, *Emery Jamieson*

To Litigate or Mediate

Suppose that an environmental regulator gives you an approval to release contaminants into the environment and that your neighbours want to fight it. Or suppose that your application is denied but you think that the regulator made a mistake. Either way, you are likely headed to an appeal to the appropriate environmental tribunal or to the court. You begin preparing for the inevitable hearing. Prior to setting the hearing you are contacted by the tribunal and offered the opportunity to have a board member act as a mediator in an attempt to resolve the dispute. You must decide whether you will try mediation or simply proceed to the hearing and let the tribunal make its decision. In other words, are you more likely to get what you want through mediation or through litigation?

The practice of environmental law often involves resolving disputes. These disputes may be between the regulators and the regulated, between governments and citizens, and between neighbours. Often they can involve numerous parties both public and private who are affected by a particular project.

Litigation is the most common method used to settle significant legal disputes. The parties argue their cases before a court or a quasi-judicial tribunal who makes the final decision subject to rights to further appeal. Litigation has become slow and expensive and many litigants are seeking a better means of resolving disputes.

The alternatives to litigation that are most often put forward are negotiation, mediation, conciliation and arbitration. Using negotiation the parties try to resolve their dispute directly or through their lawyers. Interestingly, the vast majority of lawsuits settle before the litigation process is complete. Unfortunately this is often after the litigation has been ongoing for a long time. In mediation the parties agree to use a neutral third party to help them settle their differences much sooner through face-to-face meetings. Conciliation is a form of mediation in which parties meet separately with the mediator in order to find common ground and lead to direct mediation. Arbitration involves the parties selecting one or more private arbitrators to hear their arguments and make the decision for them. Although arbitration can be quicker and simpler than the courts, if there is much at stake the process ends up being as slow and as expensive as litigation.

Arbitration has been available for many years[1]. In recent years much has been said about the merits of mediation. Increasingly, it is being made available as part of the traditional litigation process[2] involving environmental and other disputes.

Return to the problem posed at the beginning of this article: should you litigate or mediate? The answer is, of course, "it all depends". Some disputes lend themselves to an alternative process such as mediation and others do not.

The first question that must be asked is whether this dispute can be settled without complete capitulation by one or other of the parties. If your only goal is to convince the objectors or the regulators that you should have exactly what you want and no less and that you have no interest in understanding or resolving their concerns it is unlikely that mediation will be successful. If there is flexibility then mediation may succeed.

Mediation is quicker and cheaper than litigation when it results in a resolution of the dispute. However, there is no guarantee that mediation will be successful. The parties may be too far apart on some issues. It is then less certain that the mediation has resulted in any saving of time or money. It may have just added another step in the litigation process or provided your opponent with information about your case to help her with her preparation. Occasionally, however, unsuccessful mediation can reduce the number and scope of the issues that are in dispute and can produce more focused litigation of these core issues.

Those promoting mediation cite the following additional advantages of the mediation process in addition to cost and time savings, namely:

(a) It allows the parties to choose the mediator and have control over the process,
(b) It can be confidential if desired,
(c) It can preserve ongoing working relationships between the parties that could be strained through litigation,
(d) It encourages the parties to discuss the dispute directly rather than only through lawyers,
(e) It provides a setting and procedures that can be less formal and more comfortable than in a formal hearing.

If your goal is to change things not only in this case but in future ones as well, you will likely prefer litigation since it can produce precedents that will be applied to later cases. Resolution through mediation does not create precedents since neither the process nor the resulting agreement are always made public.

After reviewing these matters, your best course is to discuss the choice of litigation or mediation with a lawyer or advisor who is familiar with both procedures and who understands your goals and concerns about the dispute.

1. *Arbitration Act*, S.A. 1991, c.43.1.
2. See *Environmental Appeal Board Regulation*, Alta. Reg. 114/93, section 11; *Mediation Rules of the Provincial Court – Civil Division*, Alta. Reg. 114/97.

Ask Staff Counsel

U-Pick Owner Troubled by Proposed Feeder and Weaner Operation

Dear Staff Counsel:
I just got wind of a proposal by one of my neighbours to develop a 2000 hog feeder and 500 weaner pig operation on his property. His farm is adjacent to mine, and I am concerned that he is going to locate the barns across the road from my house. He also plans to spread the manure on a field adjacent to my 10 acre U-Pick strawberry and asparagus patch which I have operated for the last 15 years. Can he do that? What can I do?
Concerned, *B.A. Dodre*

Dear B.A.:
Your concerns with respect to your neighbour's proposed intensive livestock operation may be addressed at three points in the project's life. The project will likely require some approvals prior to construction and operation; it will be subject to regulation during the operation phase; and it may trigger some rights to compensation should you suffer some harm. As well, depending on circumstances, you might be able commence an action at common law.

Prior to construction and operation, the project may require a development permit from the municipality, so your first action should be to contact the municipal government office to determine how it is dealing with this kind of project. A government task force reviewing the issues (potential conflicts) associated with intensive livestock operations, recommended that local governments develop a permitting process, which would incorporate the *Code of Practice for the Safe and Economic Handling of Animal Manures*. The Code sets out recommended development guidelines with respect to land location, number of animals, water requirements, distance from neighbours, manure storage and management and disposal of dead animals. If a development permit is required, you may have the right to appeal. Given your U-Pick operation, you may be able to get conditions added to the permit which limit manure spreading to areas and times which would not affect your operation.

Also, at this stage, the project may require a water licence under the *Water Resources Act* or the *Water Act* (soon to come into affect) which may give you the opportunity for input into the decision making process. Finally, the *Environmental Protection and Enhancement Act* requires an approval or a registration in respect of any livestock operations the Minister of Environmental Protection designates by regulation. To our knowledge the Minister has not yet designated any proposed livestock operations. However, you might consider contacting the Minister's office to relate your concerns regarding your neighbor's proposal.

During the operation phase, the facility will be subject to the *Environmental Protection and Enhancement Act*. The Act prohibits the release of substances into the environment which may cause a significant adverse effect (sections 97 and 98). Odours and water contamination could trigger a departmental response. Should you feel that these effects are occurring or about to occur you should contact Alberta Environmental Protection and they should investigate. If the Department finds that a problem is occurring they may issue an environmental protection order to remedy the situation or they may prosecute. The *Public Health Act* (section 72 and the *Nuisance and General Sanitation Regulation*) also deals with the operation phase, as it affects human health by the creation of health hazards and nuisances.

You should also contact your local agricultural service board. Under the *Agricultural Service Board Act* they have a duty to promote, enhance and protect viable sustainable agriculture, assist in the control of livestock disease, and advise and direct soil and water conservation programs. The Act provides the board with powers to investigate and remedy situations where soil loss or deterioration is occurring, or where "the productivity of land has been or may be seriously affected by any other cause".

Regarding a common law action, you should consult with your lawyer if the intensive livestock operation adversely affects your U-Pick operation. You should be aware, however, that the *Agricultural Operations Practices Act* would protect the neighbour against a suit in nuisance if he follows generally accepted practices with respect to his operation.

Finally, note that the Department of Alberta Agriculture, Food and Rural Development is preparing a discussion paper on options for a new regulatory approach to intensive livestock operations in Alberta. The Department expects the paper to be available by the end of March, to be followed by public consultation.

Editor's Note:
Ask Staff Counsel is based on actual inquiries made to Centre lawyers. We invite you to send us your requests for information c/o Editor, Ask Staff Counsel, or by e-mail at elc@web.net. We caution that although we make every effort to ensure the accuracy and timeliness of staff counsel responses, the responses are necessarily of a general nature. We urge our readers, and those relying on our readers, to seek specific advice on matters of concern and not to rely solely on the information in this publication.

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