News Brief
ENVIRONMENTAL LAW CENTRE

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In This Issue

Delegated Organizations and Environmental Protection

Introduction

Increasingly, Alberta Environmental Protection (AEP) is looking to organizations outside government to undertake functions previously performed within the Department. These organizations are known in government circles as Delegated Administrative Organizations (DAOs), although many perform regulatory functions in addition to administrative tasks.

The delegation of government-type functions to non-government organizations is not new. However, Alberta's new DAOs have unique characteristics which raise important questions for those interested in issues of legal and political accountability. This article describes recent developments and raises issues for lawyers and those regulated by DAOs.

Existing DAOs

There are currently 6 environmental DAOs in Alberta, 4 established under *Environmental Protection and Enhancement Act* (EPEA) and 2 under the *Wildlife Act* which is also administered by AEP. They are listed below with their authorizing regulations and rules.

1. **Forest Resource Improvement Association of Alberta** – collects a portion of timber dues payable to the Crown for use in supporting various forest enhancement programs and initiatives
   - *Forest Resources Improvement Regulation*[1]

2. **Tire Recycling Management Association of Alberta** – oversees a program where an advance disposal surcharge on new tires is collected and deposited into a fund for disposing scrap tires, education programs and promoting markets for scrap tire recycling
   - *Tire Recycling and Management Regulation*[2]
   - *New Tire Advance Disposal Surcharge By-law*[3]

3. **Used Oil Management Association** – registers suppliers of lubricating oil material and administers the Lubricating Oil Material Recycling and Management Fund for lubricating oil material waste minimization, recycling and management
   - *Lubricating Oil Material Recycling and Management Regulation*[4]
   - *Lubricating Oil Material Environmental Handling Charge By-law*[5]
   - *Lubricating Oil Material Recycling and Management By-law*[6]

4. **Beverage Container Management Board** – supervises the recovery and recycling of beverage containers and the permitting of depots
   - *Beverage Container Recycling Regulation*[7]
   - *Fee By-law*
   - *Administrative By-law*

5. **Alberta Conservation Association** – has responsibility in the area of the protection of wildlife, fish and endangered species and their habitat, funded by an enhancement

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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

levy on hunting and fishing licenses
- *Alberta Conservation Association Delegated Authority Regulation*[8]

6. **Alberta Professional Outfitters Society** – has responsibility for issuing outfitter-guide permits and non-resident alien big game hunting licenses
   - *Alberta Professional Outfitters Society Delegated Authority Regulation*[9]

Issues

The main issue raised by DAOs is a simple question of characterization – is a DAO more like a government body or more like a private association? If it is a government body, then certain rights and remedies imposed by statute and administrative law will apply. If it is not, then private law remedies will apply.

DOAs themselves are not created by statute. The 6 DAOs carrying out environmental functions are incorporated under the *Societies Act*. All DAO by-laws listed above are regulations and are filed accordingly, except for the Beverage Container Management Board (BCMB) by-laws which have the status of corporate by-laws. In future, all DAO by-laws will be corporate by-laws, not regulations. This arrangement is not only confusing but it raises question about the accessibility of DAO by-laws and DAOs' accountability for their by-laws.

The particulars of the BCMB raise another issue. When AEP directly regulated beverage container depots, an appeal lay to the Environmental Appeal Board respecting the issuance or non-issuance of approvals. The transfer of the power to issue approvals to the BCMB ousts the authority of the Environmental Appeal Board to hear appeals respecting beverage container depots. As a matter of policy, the BCMB has developed an appeal process, but it lacks many of the procedural protections offered by the Environmental Appeal Board's process.

The regulations establishing some environmental DAOs create offences. For example, the *Beverage Container Recycling Regulation* creates an offence for failing to comply with a number of provisions of the regulation including s. 7 which requires manufacturers to register their containers with the Board. Potential fines upon conviction are a maximum of $50,000 for an individual and $500,000 for a corporation. How these provisions will be enforced is less than clear at this time; close cooperation between the BCMB and enforcement officials in AEP to ensure effective enforcement of these provisions is required.

These issues relate directly to the structure of AEP's DOAs. However, Prof. Fred Laux has raised a number of generic questions as to whether the following government rights and obligations, amongst others, apply to DAOs[10]:

- Application of the *Charter of Rights and Freedoms*
- Crown immunities and privileges such as the common law rule that the Crown is not bound by a statute unless it so provides
- The availability of judicial review
- Procedural protections generally such as the duty to act fairly
- The availability of an investigation by the Ombudsman
- Application of freedom of information and privacy legislation

Unfortunately, regulations delegating government functions to DAOs do not address these questions. These matters are of critical importance to the DAO and the public and business operations whose rights are determined by that DAO and they should be resolved.

■ **Donna Tingley**
Executive Director
Environmental Law Centre

1. Alta. Reg. 152/97.
2. Alta. Reg. 206/96.
3. Alta. Reg. 254/96.
4. Alta. Reg. 82/97.
5. Alta. Reg. 160/97.
6. Alta. Reg. 141/97
7. Alta. Reg. 101/97
8. Alta. Reg. 38/97.
9. Alta. Reg. 83/97.
10. F. Laux, "Some Constitutional and Administrative Law Issues Arising out of Privatization of Government Functions" (22 November 1995) An address to the Friends of the Faculty of Law, Edmonton, Alberta.

By Jillian Flett, *Alberta Environmental Protection*

Alfalfa Plant Ordered Temporarily Shut Down

R. v. Cool Spring Dairy Farms Ltd. and Hans Mullink
(1May 1998) Peace River (Alta. Prov. Ct.)

A recent Provincial Court decision has shut down conditionally the operation of a forage drying facility that was affecting neighbours adversely. This is the first case in which a court has shut down an activity using s.220 of the *Environmental Protection and Enhancement Act* (EPEA).

Cool Spring Dairy Farms Ltd., an alfalfa processing plant, was built in 1989 without any environmental approvals. Significant dust emissions from the operation adversely affected a neighbouring farmstead causing health concerns for a resident.

An enforcement order was issued to the operator requiring that they cease operation until the necessary approval was in place. The plant continued operating in contravention of the order. The order was subsequently amended. Failure to comply with an enforcement order is considered a serious offence under the EPEA Enforcement Program.

The company eventually obtained an approval in July 1996, after it was confirmed that the visible emissions from the plant met the requirements under the *Substance Release Regulations*.

The approval was subsequently appealed to the Environmental Appeal Board (EAB) by the affected neighbour. The EAB granted a request for a stay of the approval pending the hearing of the appeal. An application by the operator to lift the stay was rejected by the court unless the appeal did not go ahead as scheduled. The appeal was later postponed at which time the stay of the approval was lifted and the operator resumed operation.

The appeal was finally resolved in July 1997 when the operator, AEP and the appellant entered into an agreement, amending the conditions of the approval which was subsequently confirmed by the EAB and Minister of Environmental Protection. However, the operator did not operate in accordance with the conditions of this agreement after its acceptance.

On February 25, 1997, Cool Spring Dairy Farms Ltd. and its director, Hans Mullink, were charged with 9 counts of noncompliance with an enforcement order and 4 counts of failing to comply with the terms of their approval. On February 23, 1998, they were found guilty of 1 count of contravening the enforcement order and 4 counts of contravening the terms of the approval.

On April 7, 1998, the parties presented evidence relating to sentencing and the court ordered that the plant cease operation until sentencing on May 1, 1998.

The court sentenced both Cool Spring Dairy Farms Ltd. and Hans Mullink as follows:

- a fine of $5,000 on each of 5 counts for each party, for a total fine of $50,000, and
- an order under s.220 of EPEA to cease operation immediately until a deposit of $50,000 is paid to the clerk of the court. Upon the payment of $50,000, the operation can recommence in accordance with the terms of the court order. If the money is not paid by November 2, 1998, the plant would be deemed to have ceased operation.

"...court orders are useful tools to obtain compliance where enforcement orders issued by the Director are not complied with. They are especially powerful when they have the effect of shutting down an operation whether in the short term or permanently."

The court further ordered that if the facility is operated in accordance with the amended approval for 240 continuous days, the $50,000 would be returned. The estimated cost of undertaking the necessary work to make improvements to the plant is $100,000.

If the approval is not complied with the $50,000 would be forfeited. Any failure to comply with the terms of the court order would constitute contempt of court. The parties would then be summonsed to appear to show cause why they should not be held in contempt of court.

This decision has been appealed.

From the regulator's perspective, court orders are useful tools to obtain compliance where enforcement orders issued by the Director are not complied with. They are especially powerful when they have the effect of shutting down an operation whether in the short term or permanently.

In Progress

In the Legislature...

Federal Legislation

Bill C-32, the *Canadian Environmental Protection Act, 1998* was read the second time and referred to Committee on April 28, 1998...

Alberta Legislation

The Legislature adjourned April 30, 1998 and will resume sitting in the fall...

Bill 27, the *Electric Utilities Amendment Act, 1998* and Bill 33, the *Environmental Protection and Enhancement Amendment Act, 1998* and Bill 34, the *Municipal Government Amendment Act, 1998* received Royal Assent on April 30, 1998 and are in force as of that date. The exception is ss.19,20,25, and 29 of the *Environmental Protection and Enhancement Amendment Act, 1998* which will come into force on proclamation, and certain sections of the *Municipal Government Act, 1998*...

Federal Regulations

Part II of Schedule I to the *Hazardous Products Act* as well as the *Hazardous Products (Glazed Ceramics and Glassware) Regulations* have been amended as of March 19, 1998 to include glazed ceramic foodware and glassware. Recent scientific studies are indicating that lead levels previously considered safe may now pose a risk to the public...

The Canadian Environmental Assessment Agency is proposing an *Environmental Assessment Review Panel Service Charges Order*. The Order would be established under the *Financial Administration Act* and is designed as a cost recovery mechanism by allowing the Minister of the Environment to prescribe fees to recover the direct, standard costs that can be determined in advance of the review panel...

Alberta Regulations

AR 49/98, the *Castle Special Management Area Forest Land Use Zone Regulation* was filed March 18, 1998 and establishes a forest land use zone named the Castle Special Management Area Forest Land Use Zone. (*The Alberta Gazette Part II*, April 15, 1998, pp. 176-181)...

Cases and Enforcement Action...

The Alberta Environmental Appeal Board issued Decisions in:

- *Lucey* v. *Acting Director of Land Reclamation #4, re: Bow River Pipe Lines Ltd.*, an appeal of an Approval issued to Bow River Pipe Lines Ltd. The appeal was dismissed as the appellant did not meet any of the criteria related to "standing" in order for the Board to continue its jurisdiction nor did he provide the further information sought...

- *Consolidated Metis Locals of the Municipality of Wood Buffalo* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection*, an appeal of an Approval issued to Shell Canada Ltd. for the construction, operation and reclamation of the Lease 13 experimental oil sands processing plant. The appeal was dismissed as it was filed outside of the time lines permitted by the *Environmental Protection and Enhancement Act* and because the appellant failed to provide the Board with further written information when requested to do so...

- *Iwaskow* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection, re: Talisman Energy Inc.*, an appeal of an Approval issued to Talisman Energy Inc. for the operation and reclamation of the Teepee Creek sour gas processing plant. The appeal was dismissed due to lack to "standing"...

- *Nurani and Virji-Nurani #2* v. *Director of Action on Waste, Alberta Environmental Protection*. This appeal was a second hearing to consider if the Director was correct in denying the Appellants the Approval needed to operate a Universal Beverage Container Depot. The Board determined that the Approval should be issued and that as it had come to the same conclusion and for similar reasons as in the previous hearing, "there is no basis on which to set aside the previous Report and Recommendations, which will stand, along with the Minister's approval."...

- *Stelter v. Director of Air and Water Approvals, Alberta Environmental Protection*, an appeal of an approval to discharge treated effluent from a wastewater treatment facility into an intermittent creek flowing through the appellants property. The Board recommended that the approval be varied to require a means of discharge to the McLeod River which does not infringe the valid interests of the appellant and which avoids fisheries concerns raised by the Department of Environmental Protection...

A Provincial Court judge has ordered the Crown to pay the legal expenses of AGAT Laboratories after failing to comply with the court order requiring disclosure of information concerning the prosecution of AGAT on six alleged violations of hazardous waste storage regulations...

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

Government Proposes Move to Reclamation Audit System

The Alberta government's current initiative to review and revise the 1995 *Reclamation Criteria for Wellsites* includes a proposal for an audit system for reclamation certificates for oil and gas wellsites. This proposed system would replace the existing certification process for those sites, which under the *Environmental Protection and Enhancement Act* requires that a reclamation inquiry involving the operator and the landowner be held prior to issuance of a reclamation certificate.

The Proposed Audit Process

The proposed audit process arose out of a pilot project on reclamation audits carried out in the Green Area in northwestern Alberta in 1996[1]. This project eliminated field inquiries and relied on audits after certification to determine whether reclamation requirements were met. The sole landowner in the Green Area is the province, thus the effect of eliminating reclamation inquiries was likely insignificant from the landowner's viewpoint.

The current proposal would have operators submit more detailed applications for reclamation certificates. Satisfactory applications would be approved and a reclamation certificate would be issued without a reclamation inquiry. Government would do on-site inspections of a percentage of all sites certified during the previous year to assess the success of reclamation. Failure of an audit would result in cancellation of the reclamation certificate and imposition of a penalty against the operator. The operator would also be required to correct the problems, which would involve negotiation of a new access agreement and re-application for a reclamation certificate. Operators falling below a specified pass rate for audits would be subject to additional audits.

Operators could appeal rejection of an application or cancellation of a reclamation certificate after an audit to the Environmental Appeal Board. The appeal period for landowners would be extended where no field inquiry was held. As well, an alternate appeal mechanism would be established at the local level to deal informally with landowner-operator disagreements.

Comments

The proposed audit program lacks detail regarding the process and its potential effects. It does not set out a defined process for conducting audits, in contrast to the existing procedural requirements for reclamation inquiries under the *Conservation and Reclamation Regulation*. The government has not specified a percentage of sites that would be subject to review and audit. The potential effects of the proposal on lease agreements and access issues have not been addressed. In particular, there is no direction on how access will be dealt with when a site fails an audit. An operator may be at a distinct negotiating disadvantage when seeking to re-establish an access agreement. As well, the proposal does not address the effects, if any, that a failed audit will have on compensation payments to landowners.

There are concerns about accessibility of the audit process. The current certification system requires operator and landowner involvement in the reclamation inquiry. It is unclear whether these parties would be given the same opportunity with audits. As well, the proposal does not state whether audit results will be publicly available.

The proposed assessment of a penalty against operators for audit failure is legally questionable. If an administrative penalty is intended, it will be necessary to create an offence under either the Act or the *Conservation and Reclamation Regulation* for failure to pass an audit, as an offence must exist to enable imposition of an administrative penalty. There is also concern that imposition of a penalty and cancellation of the reclamation certificate will not be a sufficient deterrent for poor operators. As the reclamation process may stretch over a period of years, there will be a high risk of default unless some ties are created to the operator after the reclamation certificate is issued.

The proposal to extend the landowner's appeal period when there is no reclamation inquiry creates a great deal of uncertainty. The length of extension is not indicated. As well, it would be necessary to deal with the effect, if any, of an audit on the appeal period. If a successful audit is completed during the appeal period, will that terminate the appeal period or otherwise affect the landowner's right to appeal? The extension of the appeal period may also create uncertainty for operators who have completed reclamation due to the lengthy time period following issuance of the reclamation certificate.

There are also significant concerns about the proposed informal appeal process. This process is structured to have the operator and the landowner deal with each other on a negotiated basis, and the role or interest of government regulators in the process is unclear. A number of procedural questions arise as well, regarding costs, appointment of the panel, technical expertise of the panel, establishment of review criteria for the panel, consistency with reclamation standards, and the treatment of such proceedings in subsequent appeals to the Environmental Appeal Board. This informal appeal process may prejudice parties in exercising their right to appeal to the Environmental Appeal Board, particularly given the short appeal period for operators.

Fate of the Proposed Audit Process

The proposed audit process met with considerable opposition over the course of the public consultation. As a result, the multistakeholder steering group dealing with review of the *Reclamation Criteria*[2] has determined that it will not recommend an audit program to the government "at this time"[3]. It appears that the proposal for an informal appeal process at the local level remains on the table for consideration. In terms of the general process for review and

(Continued on page 10)

Supreme Court Clarifies Aboriginal Title and Use Rights

Delgamuukw v. British Columbia, (11 December 1997) #88-23799 (S.C.C.)

Introduction

Recently, Canadian courts have been grappling with the nature and extent of aboriginal and treaty rights. Although their findings and rulings have impact on aboriginal groups and their rights to land and resources, they also impact on environmental quality and resource use potential beyond native communities. This article on *Delgamuukw* v. *British Columbia* is the first of a series of *NewsBrief* articles setting forth decisions on treaty or aboriginal rights and potential effects on Alberta environment and resources.

Facts

The appellants, all Gitksan or Wet'suwet'en hereditary chiefs, both individually and on behalf of their Houses, claimed ownership, jurisdiction and aboriginal rights and title over separate portions of 58,000 square kilometres in British Columbia. Like most of British Columbia, no treaties covered these areas. The Province counterclaimed for a declaration that the appellants' have no right or interest in the land or alternatively, that the appellants' cause of action should be for compensation from the Government of Canada.

Both the trial judge and the appeal court dismissed the plaintiff's claims as well as the Province's counterclaim. The Supreme Court ordered a new trial to be decided in accordance with the principles it set forth regarding the determination of aboriginal rights and title. In setting forth these principles, the Court clarified many issues relating to aboriginal rights and title and how s. 35(1) of the *Constitution Act*[1], which affirms existing aboriginal and treaty rights, protects them.

SCC's Findings Regarding Aboriginal Rights and Title

The Majority and Minority substantially agreed. The Court set forth the following as the appropriate manner to determine aboriginal rights and title and how s. 35(1) of the Constitution Act protects them.

Distinguishing Aboriginal Title from Other Aboriginal Rights

For the first time the Supreme Court of Canada (SCC) distinguished aboriginal title from other aboriginal rights to use land and clarified the nature of aboriginal title. The Court found that s.35 (1) recognizes a spectrum of aboriginal rights in connection with land including aboriginal use rights and aboriginal title (para 137-139).

An aboriginal "use right" is a right to do certain things in connection with land, but is not a right to the land. For example, an aboriginal group might have traditional hunting or fishing use rights on a specific tract of land, or the right to carry out ceremonies, even though the group does not hold aboriginal title to that land.

By contrast, "aboriginal title" is a right to the land itself. The Court characterized this complex right to land as a right *sui generis* and having the following features:

- Aboriginal title encompasses an exclusive right of use and occupation which may be held jointly among aboriginal groups.
- The exclusive right of occupation and use is not limited to traditional aboriginal uses and customs. For example, aboriginal title includes mineral rights.
- Aboriginal title is subject to inherent limitations in that titled lands may not be used in a manner that is irreconcilable with the group's attachment to the lands. For example, aboriginal titled land traditionally used for hunting may not be strip mined, if strip mining would destroy its value for hunting.
- Aboriginal title is non-transferable and may only be surrendered to the Crown.

Time for Identifying Aboriginal Use Rights and Time for Aboriginal Title

For the first time, the SCC clarified the times relevant to identifying aboriginal use and title rights in order for them to be protected by s.35 (1). For aboriginal use rights, the practices or customs in question must have been carried out at the time of first European contact. The Court reasoned that this time is appropriate in order to distinguish protected uses from uses influenced by European contact and settlement. By contrast, the time for identifying aboriginal title is the time the Crown asserted sovereignty over the land in question. Here the Court reasoned that date of assertion of sovereignty is appropriate since aboriginal title arises out of prior occupation and is a burden on underlying Crown title. Underlying Crown title does not arise until Crown assertion of sovereignty.

Proof of Aboriginal Use Rights and Proof of Aboriginal Title

Proving aboriginal use rights involves establishing that particular practices, customs or traditions have been carried out on a tract of land. By contrast, proving aboriginal title involves establishing exclusive, continuous possession and use of the land as part of the aboriginal society's traditional way of life. Possession or occupancy is determined by reference to the activities that have taken place on the land and the uses to which a claimant has put the land. The claimant need not establish an unbroken chain of continuity. Continuity may exist where the current occupation of one area is connected to the pre-sovereignty occupation of another.

To prove both aboriginal use rights and aboriginal title, oral histories may be admissible as evidence. In the Court's words:

(Continued on page 71)

(Supreme Court Clarifies Aboriginal Title and Use Rights...continued from Page 6)

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. (paragraph 87).

Infringement of Aboriginal Rights

The SCC found that aboriginal use and title rights may be infringed by either the federal or provincial governments provided that two justification tests are met. First, the infringement must further a compelling legislative objective, and second, it must be consistent with the special fiduciary relationship between the Crown and aboriginal peoples (para. 162–169). The Court gave the conservation of fisheries as a possible example of the first, since fishing forms an integral part of many aboriginal cultures. Regarding the second, the Court stated that consultation with the affected groups is very important in determining justification and " [I]n keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed" (para. 169).

Extinguishment of Aboriginal Rights

The Court found that the federal power to legislate in respect of Indians carries with it the jurisdiction to legislate in relation to aboriginal rights and by implication, the jurisdiction to extinguish them. Notwithstanding a Province's ability to pass laws of general application that apply to Indians by virtue of Section 88 if the *Indian Act*[2], a Province, on its own, cannot extinguish aboriginal rights (para. 178-183).

Potential Impact for Alberta

The *Delgamuukw* case might impact Alberta in at least two ways:

(1) Insofar as it provides an analysis favorable to native interests for establishing aboriginal title and use rights, and
(2) Insofar as it re-confirms and clarifies government's fiduciary relation towards aboriginal groups.

Regarding (1), although treaties cover most of native land interests in Alberta, the case could be favourable to outstanding claims of aboriginal title and use rights, for example, aboriginal rights claims by the Lubicon Band. Turning to lands covered by Treaties, the case might be favourable to potential outstanding aboriginal title or use claims. For example, the numbered Treaties covering Alberta do not specifically mention water rights or ownership of beds of rivers or other water bodies within reserves. Aboriginal groups subject of numbered Treaties have claimed that they never gave up aboriginal water use rights or aboriginal title to water body beds within reserves. The Alberta Government has taken the position that any alleged aboriginal water rights or bed title were either extinguished by the federal Crown, or passed to the Province with the *Natural Resources Transfer Agreement*.[3] However, the *Delgamuukw* case, together with other SCC decisions[4] could strengthen claims of surviving aboriginal water use and title rights. It could, for example, strengthen the argument that Treaty Indians possess water use priority rights relevant to reserves better than any non-Treaty Indian licensed user under the *Water Resources Act*[5].

Regarding (2) The *Delgamuukw* case provides insight into the nature of the Crown's fiduciary duty to aboriginal peoples, especially in so far as it applies to the infringement of such rights[6]. The Supreme Court stated the degree of scrutiny required by the fiduciary duty varies depending on the infringing measure or action. For example, more scrutiny may be required where the infringed right was a right to exclusive use of a resource than where the infringed right was a limited right to use for ceremonial purposes (para. 163). But, "[T]here is always a duty of consultation and, in most cases, the duty will be significantly deeper than consultation", in some cases, economic compensation (para. 161).

Applying (2) to Alberta in respect of treaty rights, the *Delgamuukw* case gives strength to aboriginal groups longstanding view that government must consult with them and treat them fairly prior to the provincial government's granting resource dispositions relating to Crown lands that potentially infringe off reserve hunting, fishing or other use rights given under treaty.

Applying (2) in respect of other aboriginal rights, such as unsettled land claims or resource use claims, the *Delgamuukw* case gives a clear message to the Province. The Province must exercise its fiduciary duty to aboriginal groups prior to granting resource or other land dispositions that could jeopardize potential aboriginal title or use rights. The case lends impetus to the Province to finally settle outstanding claims.

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1. *Constitution Act*, 1982, (U.K.) 30 & 31 Vict., c.3.
2. S.C. 1985, c. I-5.
3. Alberta Environment, *Water Management in Alberta. Background Paper #3. Aboriginal Water Issues* (1991) at 1.
4. Significantly, *R. v. Badger* [1996] 1 S.C.R. 771; (1996) 133 D.L.R. (4th) 324, in which the Supreme Court of Canada found that the *Natural Resources Transfer Agreement* did not necessarily extinguish pre-existing aboriginal rights.
5. R.S.A., c. W-5.
6. Caselaw has established that a Crown fiduciary duty exists both in respect of aboriginal rights and treaty rights. Regarding aboriginal rights, see the *Delgamuukw* case. Regarding treaty rights, see *R. v. Sparrow* (1990) 70 D.L.R. (4th) 385, especially at 408-409 (S.C.C.).

Case Notes

FOIP Act Protects Identity of Special Places 2000 Nominators

Alberta Order 97-016 (29 January 1998) Review No. 1311 (A.I.P.C.)

The Alberta Information and Privacy Commissioner was recently required to determine whether the names of persons who had nominated particular sections of Crown land for the Special Places 2000 initiative should be released by Alberta Environmental Protection (AEP) to an Applicant who holds a grazing lease on nominated land.

The Applicant questioned whether AEP correctly applied section 16 of the *Freedom of Information and Protection of Privacy Act*[1] (the Act) when AEP refused disclosure of Special Places 2000 nominators' identities. Although AEP divulged the personal information (names, addresses and phone/fax numbers) of nominators who gave their consent to disclosure, it refused the Applicant's request for disclosure of individual nominators who did not consent.

The Special Places 2000 plan was initiated by the Government of Alberta with the goal of completing a network of Special Places representative of Alberta's environmental diversity in order to preserve the province's six 'Natural Regions', and enhance outdoor recreation, heritage appreciation and tourism development. The Commissioner accepted that nothing in the program indicates that the names of nominators are to be released, and since the program preceded the Act, there is no other legislation governing this issue under the Special Places 2000 plan.

Section 16(1) of the Act provides that the head of a public body must refuse to disclose 'personal information' about an identifiable individual, such as names, addresses, and telephone numbers, to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. The Commissioner accepted under s. 16(2)(g) of the Act that disclosure of the names of nominators is presumed to be an unreasonable invasion of third party privacy. It was then the burden of the Applicant to show that such a disclosure would not be an unreasonable privacy invasion.

The Commissioner considered several arguments in deciding whether disclosure of the nominators' names would be an unreasonable invasion of personal privacy. Of these three are most significant:

- The Commissioner accepted that, although disclosure of personal information is desirable for the purpose of subjecting public body activities to public scrutiny, this was not a relevant consideration here. The Commissioner found that the Applicant was more interested in scrutinizing the individual nominators rather than the AEP's activities as a public body[2].

- The Commissioner found that, although the Applicant's right to use the land may be affected by a Special Places 2000 designation, a mere nomination is not determinative of any rights, thus the application for disclosure of personal information is irrelevant. The Commissioner went further in stating that even if the nomination was found to affect the Applicant's rights, personal information is irrelevant to a fair determination of those rights.

- Finally, the Commissioner found that refusal to consent to disclosure is, of itself, a relevant consideration in the determination of unreasonable invasion of privacy under s. 16 (1) and (2).[3]

The Commissioner concluded that AEP used the correct process in considering and applying the relevant circumstances, and the Applicant did not discharge the burden of proving that the disclosure of nominators' personal information would not be an unreasonable invasion of a their personal privacy. Although the Applicant attempted to argue that knowing the names of nominators is necessary to determine whether there is broad support for the nomination or whether the nomination was vindictive, the Commissioner found these to be irrelevant to the issue of privacy invasion. The Commissioner ordered that AEP must not disclose the nominators' personal information to the Applicant.

This decision will likely discourage applications for the release of nominators' personal information under Special Places 2000, especially where the nominator has explicitly refused consent and where the AEP has already released other information about a particular nomination. It appears that the Commissioner wishes to limit the release of such information to situations where non-release will truly cause some appearance of secrecy within a public body or be markedly detrimental to an applicant's rights.

■ **Shannon Keehn**
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1 *S.A. 1994, c. F-18.5.*
2 *See* Alberta Order 97-002 (June 17, 1997) Review NO. 1122 (A.I.P.C.).
3 *See* Alberta Order 97-011 (September 18, 1997) Review No. 1270 (A.I.P.C.).

EAB Outlines Test for Reconsideration

Laidlaw Environmental Services (Ryley) Ltd. Request for Reconsideration (7 April 1998) #96-059 (EAB)

In *Laidlaw* the EAB has articulated for the first time the factors it will use in deciding whether it will reconsider its recommendations. Section 92.1 of the Alberta *Environmental Protection and Enhancement Act*[1] states:

> Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it.

The Board had not previously laid out the criteria it would use in exercising this discretion, "preferring instead to decide whether to grant reconsideration requests on the bases of the particular merits of each request." Here the Board stated that it will only grant such a request if there are "exceptional, compelling circumstances" for it to do so.

Laidlaw's request for reconsideration arose from the Board's recommendation that an approval issued to Laidlaw for the operation of a hazardous waste landfill near Ryley be affirmed by the Minister, subject to some changes as outlined by the Board. The change driving the request for reconsideration was that Laidlaw would have to alter the thickness of the clay liner of the landfill from 0.6 meters as required in the original approval, to 1.5 meters. The Minister accepted this recommendation, and issued an Order that the changes be implemented.[2]

Laidlaw's main argument was that it had new evidence on the thickness requirement that had not been presented at the hearing. It also argued that reconsideration was necessary to ensure the recommendation had been based on sound engineering principles, and because it was ambiguous in both what it required and in what it applied to.

The Board rejected these arguments. It noted that at the original hearing, held over four days and accompanied by over 700 pages of written submissions, evidence had been presented by both sides, both directly and indirectly, that should have put Laidlaw on alert that the thickness requirement was an issue. That Laidlaw now felt it wanted to re-address the issue was held by the Board not to be new information. Even if it were, the Board noted that this would not automatically lead to the granting of reconsideration request: it would still have to be compelling and exceptional, which it was not in this case. In addition, the Board stood by its original finding that sound engineering principles were adhered to in the recommendation, and held that it was not ambiguous.

The Board not only rejected Laidlaw's arguments, but also presented some arguments of its own as to why reconsideration should not be granted. The Board found that there was a need for finality on the issue, and that the delay would impose undue financial costs on the other parties. These arguments are significant because in most cases financial hardship and the need for finality will be present. Whether future requests for reconsideration will be successful thus appears to require circumstances that are exceptional and compelling enough to outweigh these arguments.

■ **Mike Callihoo**
Research Assistant
Environmental Law Centre

1. S.A. 1992, c. E-13.3.
2. A recent Alberta Queen's Bench decision has held that the Board has the authority to reconsider its recommendations even after the Minister has issued an order. See *Nurani v. Environmental Appeal Board*, (27 November 1997) Action No. 9703-18343 (Alta. Q.B.).

EPEA Admin Penalties

The Environmental Service of Alberta Environmental Protection has issued the following administrative penalties since the last issue of *News Brief*:

- $5,500. to Northern Alberta Nitrogen Ltd. of the M.D. of Smoky River No. 130 for failing to comply with the terms of their Approval regarding conducting and submitting stack survey reports, not submitting their 1996 annual report on time, and not submitting their soil monitoring program proposal within the timeframe specified, contrary to s.213(e) of the *Environmental Protection and Enhancement Act*.
- $3,500. to Crop Tech Agro Ltd. operating in the M.D. of Wainwright No. 61 for combining pesticides contrary to label specifications and applying the mix contrary to label instructions resulting in damage to neighboring shelter belts. This action was in violation of s.156(5) of the *Pesticide Sales, Handling, Use and Application Regulation*.
- $14,000. to Petro-Canada operating in the M.D. of Yellowhead No. 94 for exceeding their Approval limits for minimum flue gas temperature, SO2 concentration and mass emission rate, and for failing to submit stack survey reports within the specified timeframe contrary to s.213(e) of the *Environmental Protection and Enhancement Act*.

A FOND FAREWELL

When I was in law school in the early 80's the Environmental Law Centre seemed to be synonymous with the name of Linda Duncan - young, brash, effervescent and with a healthy irreverence for the traditional approaches to dealing with environmental legal issues. When I came to work at the ELC in 1989 in the warren of rooms and converted offices above Scandia Furniture, Linda was gone, but I found Donna, Elizabeth, Dolores, Marge and Laura, and an organization that was involved in many environmental issues at many levels. There was an air of excitement and commitment amongst the staff and board which made working here exciting and educational. I will fondly remember the paper-thin office walls and shared windows which allowed Elizabeth and I to assist each other in answering requests for assistance! The AEN meetings when Elizabeth and I shared a seat on the Steering Committee and referred to ourselves as Slash and Burn, Elizabeth's book, the launch of the *Journal of Environmental Law and Practice*, pulp mills and dams, the NRCB and AEPEA, Arlene's range wars and the librarians - all contribute to warm memories and strong friendships.

The ELC has matured into a well-respected organization that is somehow greater than the people who work for it. As I move on to other challenges I will miss the people!

Howard Samoil
Staff Counsel
Environmental Law Centre

(Government Proposes Move to Reclamation Audit System...continued from page 5)

revision of the *Reclamation Criteria*, the steering group will develop recommended criteria that will be field tested and monitored this year, taking into consideration the results of the public consultation and suggestions from a technical subcommittee. The recommendations will be provided to the Ministers of Environmental Protection and Agriculture, Food and Rural Development.

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

1. Alberta Environmental Protection Information Letter IL 96-2 Relm (16 September 1996).
2. The Steering Group is made up of 11 representatives from government, the oil and gas industry, agriculture and landowners.
3. Wellsite Reclamation Criteria and Certification Process. Public Consultation, Update to Registered Participants, at (1 May 1998).

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By Andrew R. Hudson, *Environmental Law Centre*

Bad Advice

You rely on professionals to help you in your duty to protect the environment, defend against allegations that you have not protected the environment and seek redress from those who harm the environment. You ask consultants to review your management practices. You call upon engineers to handle technical matters. You use accountants to track costs. You retain lawyers to sue and to keep you from being sued. Sometimes the professionals get it wrong and you suffer. This column examines actions against professionals for their mistakes.

A professional's services are usually provided under an agreement between the professional and the client. The agreement could be in writing but need not be. An action for breach of contract is available to the client if the professional does not live up to that agreement. It is unusual for the agreement to set out the exact standard of services expected from the professional. If it did, any deviation from that standard which causes loss will be actionable.

When no standard is expressed in the agreement it is implied that the professional will meet the standard of a reasonably competent professional in the same profession. If that standard is not met, then the professional faces liability. In all but the clearest cases it is necessary to provide evidence, usually from experts in the same field, of what a reasonably competent professional should do.

Professionals can make errors and cause losses without being held liable. For example, a professional may encounter a new situation and handle it unsuccessfully, but where his reasonably competent colleague would do the same thing. If the professional does not deviate from the standard of the reasonable professional and in spite of this there is a loss, the professional will escape liability. This would not be the case, however, if the professional agreed to obtain the desired results.

Contractual liability doesn't help you if you did not hire nor pay for the services. You may have been advised of the result and you may have relied on that in making decisions but that doesn't make you a party to the contract and able to sue for its breach.

You may not have a contract with the professional but you may still be able to bring action in tort and win damages. The leading case in this area is *Hedley Byrne & Co.* v. *Heller & Partners Ltd.*[1] that was decided by the House of Lords. The plaintiff had asked its banker about financial ability of one of the bank's other clients. The bank provided a favourable report upon which the plaintiff relied. In the end the report was negligently prepared and the plaintiff, unable to collect from the client, suffered loss. It sued the banker. It was clear that there was no contract between the plaintiff and the bank. Nevertheless the court held that the banker could be liable to those who may reasonably be expected to rely on its report. Based on this and subsequent cases, you can bring action against a professional outside of contract law if:

1. There is a sufficient relationship between the plaintiff and the professional to conclude that there should be a duty of care owed by the professional to the plaintiff,
2. The advice or direction is wrong and was given negligently,
3. It was reasonable for the plaintiff to rely on the advice, and
4. In reliance on the advice, the plaintiff suffered loss.

In the end, the *Hedley Byrne* case was decided in favour of the banker because the banker had notified the plaintiff that it would not be responsible for the report that it sent to the plaintiff. Professionals may rely on disclaimers of and limitations on their liability, not only in their own contracts but also in the contracts that those for whom they are doing the work.

There are circumstances when you may have both a contractual claim and an action in tort. You don't get to collect twice but you may be able to maximize your claim because of the differences that exist between the two causes of action.

It was once the case that negligent conduct that produced economic loss only, as opposed to personal injury or property damage, was not actionable. *The Hedley Byrne* case clarified, at least in regard to negligent statements, that pure economic loss could also be recovered.

In our litigious society, professionals strive to give expert and practical advice. None want to cause loss to others. It is a fact of life that some do and that action will be brought to recover damages. But remember this, if you expect to sue a professional you will likely have to engage other professionals to do so successfully.

[1] [1964] A.C. 456, [1963] 2 All E.R. 575 (H.L.).

Ask Staff Counsel

Worth More than Board Feet: Acreage Owner seeks Environmental Damages for Tree Trespass

Dear Staff Counsel:
I live on an acreage with mature aspen and conifer groves. My neighbour, in his zeal to turn his piece of aspen parkland into a Kentucky bluegrass prairie and improve his view of the river valley, cut down a large number of trees on my property without my permission. He admitted to the trespass, but we cannot agree on damages. He has offered the commercial value of the lumber, but I don't think that's fair as he wrecked some of my natural surroundings and ruined my view. I used to look at a forest; now I look at his wasteland and the back of his garage! I want him to replace the trees taken with equivalent sized trees. Where do I stand in this matter?

Yours truly, Daniel Boone's Neighbour

Dear Neighbour:
Your issue with respect to damages is an interesting one, and the response of the courts to situations like yours may not be quite to your liking. Courts typically assess damages on the basis of market value, which, as you illustrate, does not always fairly compensate for environmental and aesthetic loss. However, at times a court will allow restoration costs and punitive damages for such loss, but even then the results might not be completely to the injured party's satisfaction.

For example, Hutton *v. Morehouse et al*, a recent decision of the Supreme Court of British Columbia (#6215, Nelson), dealt with a situation similar to yours. The Defendant Morehouse cleared his own property along with a number of the Plaintiff's trees. The Plaintiff sued for restoration costs and tendered estimates ranging from $76,000 to $143,000 for the replacement of his trees the Defendant cut. Following a review of bases for damages resulting from a trespass, McEwan J., determined that it must assess for what is reasonable having regard to the circumstances. Although he would allow reasonable restoration costs, he did not require "meticulous restoration". He noted that even had the Defendant stayed within his borders, his clearing would have diminished the aesthetic value of the Plaintiff's property. As well, McEwan J. recognized the difficulty in determining what is reasonable "where the value that is lost - nature in its undisturbed state - can only be remedied by artificial means". In the end, McEwan J. awarded $20,000, concluding that he could not be "satisfied that more modest efforts coupled with letting nature take its course" would lead to a more satisfactory result than the proposed restorations. The Court also awarded $25,000 for loss of amenities, and $30,000 punitive damages.

So, where do you stand? It is almost always better to try to settle a dispute between neighbors without going to court. The use of a mediator might be helpful. However, if the matter nevertheless goes to court, first you will have to convince the judge to allow damages based on restoration costs, which may not be easy. Alberta courts do not have to follow the British Columbia example. You also likely will want to request damages for loss of amenities and punitive damages. You will have to get estimates for restoration and try to convince the court to accept them. Be warned, however, given how unaccustomed our courts are in dealing with damages for environmental and aesthetic loss, you might have to look to "letting nature take its course" to deal with some of the indignity you feel.

Dear Staff Counsel:
I am an avid reader of News Brief. In past issues staff writers have promised to let readers know when proposed legislative changes will actually become law. I'm particularly interested in the Alberta *Water Act* and the proposed changes to the federal *Income Tax Act* regarding ecological gifts of capital property. I haven't seen an update yet. What gives?

Sincerely, Gimme a Date

Dear Gimme:
Here are some dates, though perhaps not the ones you hoped for. The *Water Act*, assented to September 3, 1996, still has not been proclaimed into effect. Government is waiting for regulations, apparently which are not yet finalized. Our sources tell us that the Act should be proclaimed by fall or in the fall. Regarding proposed changes to the federal *Income Tax Act* (*see* Ask Staff Counsel feature "Update on Conservation Easements and Recent Tax Proposals", News *Brief* Vol. 12 No., 1997), Federal Bill C-28, which contained the proposals, was passed by the House of Commons on April 21, 1998. As at May 28th, 1998, it had not gone farther.

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.

Ask Staff Counsel Editor:
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