News Brief
ENVIRONMENTAL LAW CENTRE

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In This Issue

Timber Permit Quashed to Protect Treaty Rights

Introduction

The recent case of *Halfway River First Nation* v. *British Columbia (Ministry of Forests)*[1] raises important questions about a provincial Crown's obligations to First Nations regarding proposed dispositions of interests in provincial Crown lands. Even though the British Columbia Supreme Court decided the *Halfway River* case, the decision could be quite relevant to Alberta. Many British Columbia aboriginal law cases focus on pre-treaty, or extra-treaty aboriginal rights or title. *Halfway River*, however, concerns interpretation of treaty rights. The treaty in question was Treaty #8 of 1899. Although Treaty #8 spans parts of British Columbia, Saskatchewan and the Northwest Territories, its largest Treaty area is within Alberta.

This is the second article in a series of aboriginal law cases that could impact environmental and natural resource management in Alberta as well as aboriginal groups[2].

Facts

In 1995 the petitioner Halfway River First Nation (Halfway) filed a Treaty Land Entitlement claim over an area of land known as the "Tusdzuh", an area immediately adjacent to the Halfway Reserve. Halfway claimed the Tusdzuh was integral to their culture in that it was used for hunting and other traditional purposes. At the time of judgment, the treaty entitlement claim remained unresolved.

In September of 1996 the British Columbia Ministry of Forests (MOF) issued cutting permit 212 (CP212) to Canadian Forests Limited (Canfor). CP212 is located within the Tusdzuh area. In December Canfor attempted to begin harvesting, but Halfway erected a roadblock. Canfor applied for an injunction and Halfway sought judicial review to have CP212 quashed on several grounds. This article focuses only on the petitioner's claim that MOF's issuing CP212 unjustifiably infringed Halfway's treaty rights.

Treaty Rights at Issue and Alleged Infringement

Under Treaty 8 the Beaver First Nation (of which Halfway is a member) agreed to surrender "all their rights, titles and privileges" to the surrendered area, which included the Tusdzuh. By the Treaty's terms, in return for the surrender, the government agreed that the Beaver First Nation "shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered, subject to such regulations as may be from time to time be made by the Government... and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

Halfway contended that MOF's issuing CP212 unjustifiably infringed their treaty rights to use these lands for traditional purposes. In support of their claim, Halfway tendered evidence that logging under CP212 would negatively affect wildlife and potential hunting. The Court accepted this evidence. The issue thus was more legal than factual.

In their argument, Halfway relied on section 35(1) of the *Constitution Act*,

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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

(Timber Permit Quashed...continued from page 1)

1982 which affirms existing aboriginal and treaty rights. In reaching its judgement the Court applied the tests of the Supreme Court of Canada in *R.* v. *Sparrow*[3] which interpreted section 35(1). In determining whether Halfway's treaty rights were infringed, the Court asked:

1. Can Halfway establish interference with a treaty right, and if so, can Halfway establish *prima facie* infringement?
2. If so, can MOF justify the infringement?

The Court answered both parts to question 1 in the positive and answered question 2 in the negative. It quashed the timber permit and set out MOF's duties for similar situations. Here is how the Court reasoned:

Step I: Interference and Prima Facie Infringement

The Court's distinction between "interference" and "*prima facie* infringement" was not always clearly drawn. The distinction however was not relevant to Canfor's first line of defense. In effect Canfor argued that there could not be interference (or infringement) with Halfway's treaty rights since MOF issued CP212 for "lumbering" which was specifically excepted in the Treaty 8 right in issue. The Court disagreed. It relied on cases relevant to Treaty interpretation as well as on government statements made at the time of Treaty negotiations that "they [the Beaver First Nation] would be free to hunt and fish after the treaty as they would be if they never entered into it."[5] Noting that the onus on Halfway is not heavy[6], the Court suggested that it would not be difficult for *prima facie* infringement to follow from any interference with the Treaty 8 hunting right.[7]

In continuing to determine *prima facie* interference, the Court followed *Sparrow* in asking if the "limitation" (presumably the interference)
(a) is unreasonable,
(b) causes undue hardship or
(c) denies the preferred means of exercising the right.

The Court made each determination in Halfway's favor.

Regarding (a) Canfor and the MOF argued that since CP212 only applied to a small portion of the Tusdzuh, the limitation was reasonable. The Court disagreed noting that the Tusdzuh wilderness was one of the last areas where the First Nation could exercize its traditional way of life. Logging the Tusdzuh would irrevocably change its character and there were other areas that Canfor could log.

Regarding (b), the Court noted that Halfway Nation members depend on hunting to feed their families. It accepted evidence that encroachments from development on hunting already have caused hardship and it could find no persuasive evidence that Halfway readily could hunt in other areas if the CP212 area were logged.

Regarding (c), the Court found MOF's approval of CP212 would deny Halfway of its "holistic perspective" in exercising of treaty rights, here, in an unspoiled wilderness adjacent to the reserve.

On the basis of these determinations, the Court found that MOF's issuing CP212 constituted a *prima facie* infringement of a treaty right.

Step 2: Can the Infringement be Justified?

Following *Sparrow*, in determining whether the MOF could justify the *prima facie* infringement, the Court asked:
(a) whether the interference had a legitimate objective, and
(b) whether the honour of the Crown has been upheld.

Regarding (a), the Court found no legitimate objective. Following *Sparrow* it rejected pursuit of the public interest as an objective, and it found that mere enhancement of the British Columbia economy would not suffice.

Regarding (b), the Court found that the Crown's honour was not upheld. The Court determined that Canfor was given priority over Halfway, that other areas

(Continued on Page 10)

Enforcement Briefs

By Jillian Flett, *Alberta Environmental Protection*

The Role of the Compliance Division

The newly formed Compliance Division of Alberta Environmental Protection (AEP) is now coming onstream.

Compliance Division's mandate is to lead the development of, and provide support for, a consistent, harmonized and effective compliance assurance and enforcement framework for AEP. The division has a department-wide focus and will build on the successful compliance assurance and enforcement programs in each of the department's three Services (Environmental Service; Natural Resources Service; and Land and Forest Service) to develop a departmental program. The program will include formal enforcement responses (such as administrative penalties and prosecutions) and compliance assurance activities (such as inspection programs).

The division's 11 staff are drawn from each of the department's three Services. Staff will use their knowledge and experience of their Service's compliance assurance and enforcement programs to develop a harmonized Compliance Assurance and Enforcement Program for the department. The departmental program will ensure consistency between the policies and legislative programs developed by the Services for their respective operations.

The Services' compliance assurance and enforcement programs will be delivered by regional offices. This is part of AEP's commitment to community level service.

Compliance Division will also be responsible for the development of a common tracking system for all AEP compliance assurance and enforcement activities. The system will provide useful information for reporting on department enforcement activities, and for the development of enforcement activity performance measures. (Performance measures are used in the government business planning process as a way of measuring how effectively departments meet their objectives.) Performance measures will help ensure the Compliance Assurance and Enforcement Program is an effective tool for AEP in protecting, enhancing and ensuring the wise use of the environment.

For further information on the Compliance Division please contact Jillian Flett at (403) 427-5842.

EPEA Admin Penalties

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

- $4,000 to Gulf Canada Resources Ltd. for exceeding one-hour concentration and one-hour mass emission limits for SO_2 specified in their Approval to operate the Nordegg River sour gas plant.
- $8,500 to Lakeside Feeders Ltd. (operating as Lakeside Packers) in the County of Newell No. 4 for contravening its Approval by failing to submit a full characterization survey of wastewater, develop and implement a Best Management Practices Plan and soil monitoring proposal, submit a brine water reduction plan and the 1996 annual report within the specified timeframe, and maintain pH levels as required and operate the rendering building in the manner specified.
- $14,000 to Wascana Energy Inc. operating in the Municipality of Wood Buffalo for failing to submit several monthly air emissions reports, the 1996 and 1997 annual air emissions reports, and the 1997 annual wastewater report within the timeframes specified in their Approval. The penalties pertain to Wascana's operation of the Cowpar sour gas plant.
- $4,000 to Wayne's Aviation Salvage and Parts 1994 Co. Ltd. of the County of Vulcan No.2 for aerial application of the insecticide Lorsban 4E contrary to the pesticide label. This action violates s.156 of the *Environmental Protection and Enhancement Act*.
- $19,500 to Morrison Petroleums Ltd. of the Municipality of Crowsnest Pass for failing to immediately report several releases of SO_2 in concentrations that exceeded air quality guidelines, contrary to s.99(2) of the *Environmental Protection and Enhancement Act*. The penalty was also for not having air monitoring equipment operational 90% of the time for February 1997 as required by their approval to operate the Coleman sour gas plant, contrary to s.213(e) of the *Environmental Protection and Enhancement Act*.
- $9,500 to Gulf Canada Resources Ltd. in Lacombe County for failing to submit monthly air emission reports and an annual air emissions summary within the timeframe specified by their approval to operate the Medicine River gas plant.
- $750 to Creek Valley Agro Inc. of Special Area 4 for applying Roundup Liquid Herbicide in a manner that resulted in an adverse effect to an adjacent field contrary to s.5 of the *Pesticide Sales, Handling, Use and Application Regulation*.
- $1,000 to Mobil Oil Canada Ltd. operating in Mountain View County for constructing and operating a new sulphur recovery unit at the Harmattan sour gas plant without first obtaining an amendment to their approval authorizing them to do so. This is in violation of s.64 (1) of the *Environmental Protection and Enhancement Act*.

In Progress

In the Legislature...

Federal Regulations

The *Domestic Substances List* has been amended as of June 10, 1998. (*Canada Gazette Part II*, June 24, 1998, pp. 1925-1932)...

As of September 1, 1998, *Regulations Amending the Transportation of Dangerous Goods Regulations (No. 23)* are in force. (*Canada Gazette Part II*, July 22, 1998, pp. 2139-2157)...

MMT has been deleted from the schedule to the *Manganese-based Fuel Additives Act* as of July 20, 1998. (*Canada Gazette Part II*, August 5, 1998, p. 2265)...

Alberta Regulations

The *Oil and Gas Conservation Regulation* has been amended by AR 128/98. The amendment increases the abandonment fund levy from $70 to $100 for each inactive well in each class...

The *Freedom of Information and Protection of Privacy Regulation* has been amended by an Order in Council to allow non-disclosure of specific information from *in camera* meetings of local public bodies...

Cases and Enforcement Action...

The Federal Court of Canada:

- Released a decision in *The Friends of the Oldman River et al.* v. *Minister of Fisheries and Oceans*. The Judge has ordered the Minister of Fisheries and Oceans to comply with the requirement in the *Fisheries Act* that stipulates an annual report must be produced and submitted to Parliament...

- Per Judge McKeown, dismissed the application seeking judicial review of the Cheviot mine decision...

The Provincial Court of Alberta has handed down the following convictions:

- Van Waters & Rogers Ltd. of Calgary was convicted of releasing xylene into the storm water system contrary to s.98 (2) of the *Environmental Protection and Enhancement Act*. The Company was fined $80,000 plus a Creative Sentencing Order that is estimated to be worth another $100,000...

- Hans Mullink and Cool Spring Dairy Farms Ltd. of the M.D. of Fairview were both convicted under s. 213 (g) of the *Environmental Protection and Enhancement Act* of contravening an Enforcement Order and fined $5,000 and ordered to cease operation until certain conditions were met. Another eight related counts were dismissed. A Notice of Appeal has been filed. In addition, both were convicted on four counts under s.213 (e) of the Act and fined $5,000 on each count...

- Blaine Lefebvre of St. Albert was convicted of releasing a substance contrary to regulations, unlawfully accepting hazardous waste without a PIN, and commencing an activity without the appropriate approval all in violation of the *Environmental Protection and Enhancement Act*. He was fined $5,000, $1,000, and $1,000 respectively...

- In Red Deer, Twin Rock Resources Ltd. pled guilty to 17 charges of falsifying reports or misreporting production information to the Alberta Energy and Utilities Board. It was fined $500 on each charge plus a 15 per cent victim surcharge...

The Alberta Environmental Appeal Board issued a Report and Recommendations in:

- *Ault* v. *Director of Pollution Control Division, Alberta Environmental Protection*, an appeal of an Administrative Penalty issued to the Marwayne Bottle Depot. The Board appointed a mediator and a Mediation Agreement was reached requesting an Order declaring the Administrative Penalty void. The Minister signed the Order, voiding the penalty...

- *Ash* v. *Director of Southern East Slopes and Prairie Regions, Environmental Regulatory Service, Alberta Environmental Protection, Re: City of Calgary*, an appeal of Approvals issued to the City of Calgary for pesticide spraying. The Board made a number of recommendations specific to the Approvals and some general recommendations. The Minister accepted and implemented the specific recommendations but not the general ones because he concluded that they were too general...

The Natural Resources Conservation Board/Canadian Environmental Assessment Agency Joint Review Panel released its report into the *Little Bow Project/Highwood Diversion Plan Application to Construct a Water Management Project to Convey and Store Water Diverted from the Highwood River*. "The Panel recommends the Little Bow River Reservoir, Highwood River Diversion Works and Clear Lake Projects receive regulatory approval from the Government of Canada" and makes a number of recommendations on how the project should proceed...

■ **Andrew Hudson**, *Staff Counsel*
Dolores Noga, *Librarian*
Environmental Law Centre

Regulating Intensive Livestock Operations

Livestock Operations – Environmental Impacts

Many Albertans were surprised to learn the results of a recent government study on the impact of agriculture on water quality in Alberta: "agricultural practices are contributing to the degradation of water quality"[1] – followed by the conclusion that "the risk of water quality degradation by agriculture is highest in those areas of the province which use greater amounts of fertilizer and herbicides, and have greater livestock densities[2]." The study attracted the attention of provincial politicians who have identified increased livestock production, both of hogs and cattle, as a major source of new economic development for the province.

Solutions offered by the study's authors covered many fronts from technology transfer to research to monitoring. Also included were recommendations on regulations; that there be a review of the adequacy of and enforcement procedures for existing environmental and public health regulations to protect water quality[3]. This later recommendation was taken up by the Alberta Department of Agriculture, Food and Rural Development who quickly produced a Discussion Paper called *Regulatory Options for Livestock Operations*[4]. This report reviews existing legislation applicable to intensive livestock operations and outlines options for new regulations. Publication of the Discussion Paper was followed by a consultation process where public input was requested. The results of the consultation process are now before a multi-stakeholder advisory committee. Environmental Law Centre Staff Counsel, Andrew Hudson, is a member of that committee.

Existing Rules

At the present time, intensive livestock operations are regulated most directly by the municipalities in which they are located through the development approval process under the *Municipal Government Act*. Development requirements vary from municipality to municipality. Over 90% of rural municipalities require full details of a proposed intensive facility; the remaining rural municipalities either do not permit intensive livestock operations or do not review individual developments[5]. Most rural municipalities in the agricultural area of the province refer applications for intensive livestock operations to Alberta Agriculture, Food and Rural Development for a determination of compliance with the *Code of Practice for the Safe and Economic Handling of Animal Manure's* ("*Code of Practice*"). The *Code of Practice* is a voluntary set of guidelines dealing with technical standards for establishing and operating livestock facilities.[6]

Intensive livestock operations do not require specific authorization under the *Environmental Protection and Enhancement Act* (EPEA). However, they are subject to the general provisions prohibiting the release of a substance that causes or may cause a significant adverse effect. It is ironic that early drafts of EPEA and the regulations included a requirement that intensive livestock operations obtain an approval under the legislation. However, the requirement was removed following opposition from livestock producers.

New Legislation?

Regulatory Options for Livestock Operations presents a number of options for achieving its stated goal of ensuring that "our livestock industry continues to evolve and grow in a manner that is **environmentally sustainable and protects human health and the rights of individuals**[7]". The options are divided into three sections: (1) development permits and approvals; (2) operational regulations; and (3) compliance and enforcement. In each section, the Discussion Draft proposes options ranging from the status quo (continued municipal regulation) to provincial regulations and enforcement.

ELC Position

The Environmental Law Centre's brief responding to the Discussion Draft sets out this general position:

The ELC's objective in commenting on this issue is to ensure that new legal processes are implemented which deal effectively and fairly with the problem of pollution from livestock operations. We believe that there is no reason not to treat livestock operations in the same manner as other businesses and industries whose activities can cause environmental harm. It is also our belief that the environmental rules that apply to livestock operations should be set out in an act and regulations and that they should be enforceable. The legislated requirements should be subject to comment from the public, including livestock operators, and they should be clear, but if there is an infraction, there should be certainty of enforcement action.

The ELC acknowledged the continuing responsibility of municipalities for planning matters but urged the government to assign responsibility for regulating the environmental impacts of intensive livestock operations to Alberta Environmental Protection, the government authority with the technical expertise and experience in both issuing approvals and enforcing environmental standards.

For the complete Environmental Law Centre brief, visit the ELC web site: www.web.net/~elc.

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

1 Canada – Alberta Environmentally Sustainable Agriculture Water Quality Committee, *Agricultural Impacts on Water Quality in Alberta: An Initial Assessment* (Lethbridge: Alberta Agriculture, Food and Rural Development, 1998), at 25.
2 *Ibid.*
3 *Ibid.* at 35
4 Alberta Agriculture, Food and Rural Development, Environmental Protection, Health and Municipal Affairs (March, 1998)
5 *Ibid.* at 4
6 There is a new draft *Code of Practice for Responsible Manure Management* (Sept.98).
7 *Ibid.* at 1.

New Amendments to EPEA

A number of amendments were made to the *Environmental Protection and Enhancement Act* by the *Environmental Protection and Enhancement Amendment Act, 1998*, which was passed in the 1998 spring of the Alberta Legislature. All but four sections of the *Amendment Act* came into effect on April 30, 1998. Sections that have not yet come into effect are noted.

Changes to the *Environmental Protection and Enhancement Act* are as follows:

- Amends the **definitions of "quarry" and "well"** (s.1(bbb) & (yyy)) to clarify the application of those terms.

- Amends s.10 to **allow for federal participation on committees** appointed by the Minister or the Director (previously interdepartmental committees), likely to facilitate implementation of the *Harmonization Accord* signed earlier this year.

- Amends s.33 to **restrict public access to reports or studies** provided to the Department under regulations. The amendment, which provides that the regulations requiring the reports or studies must provide that those documents be disclosed to public, will have the effect of restricting public access to those documents. The most notable effect of this amendment may be to deny public access to reports compiled and provided to the Department under Codes of Practice.

- Adds **regulation-making powers** related to **delegated authorities** (s.35(f)).

- Adds new sections (ss.62.1 & 123(1.1)) allowing the Director to **refuse to issue approvals or registrations** and inspectors to **refuse to issue reclamation certificates where the applicant owes money to the Crown.**

- Changes references to "notice of objection" to **"notice of appeal"** throughout the Act.

- Amends s.99 to require **a person reporting a release** to report it to a person to whom they report in an **employment relationship.** The amendments also clarify the requirement for reporting a release to a person having control of the released substance.

- Amends the **definition of "operator"** (s.119) to include working interest participants in wells.

- Adds the requirement (s.123) that an **operator apply for a reclamation certificate** within the time provided in the regulations.

- Amends s.127(2) to provide for a **broader scope of persons** to whom the Director may issue an **environmental protection order after issuance of a reclamation certificate.**

- Amends the **general prohibition regarding waste disposal** to allow for disposal in accordance with the Director's written authorization (s.168.1) ands adds a new section **deeming disposal of waste** where it is moved by natural forces or another person (s.168.2). These sections will come into force upon proclamation and had not been proclaimed as of August 11, 1998.

- Adds the ability for the Director to **amend enforcement orders** (s.202) and **environmental protection orders** (s.229) **to add to the list of persons** to whom such an order is directed. Previously, the Director was required to issue a new order to additional persons where the Department wished to make those persons subject to the terms of an existing order.

- Adds a new section (s.205.1) giving the **government priority for costs** incurred in carrying out specified actions, including environmental protection orders and enforcement orders. The costs will **constitute a first charge** against the property on which the actions related to the costs took place.

- Adds a new section (s.206.1) allowing the courts to make **orders extending limitation periods** for claims related to adverse effects from releases to the environment. This section will come into force upon proclamation and had not been proclaimed as of August 11, 1998.

- Adds a new section (s.210.1) enabling **registration of contaminated site designations, environmental protection orders and enforcement orders** against the **title of land** affected by those documents. Upon registration, the Registrar of Land Titles will provide notification to the registered owner and all persons with a registered interest against the land.

- Amends s.226 to **change the standard of liability for executors, administrators, receivers, receiver-managers and trustees** under environmental protection orders. This will make the standard for receiver-managers and trustees in bankruptcy in particular equivalent to that provided for in the *Bankruptcy and Insolvency Act* (see *News Brief*, Vol.13, No.1, p.5). This section will come into force upon proclamation and had not yet been proclaimed as of August 11, 1998.

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

Bridges and Roads – You Can't Assess One without the Other

The Friends of the West Country Association v. Minister of Fisheries and Oceans Director, Marine Programs, Canadian Coast Guard[1]

Introduction

The federal *Navigable Waters Protection Act*[2] requires federal approval in order to construct a bridge over navigable water. Sunpine Forest Products Ltd. (Sunpine) applied for two approvals under that Act, one to construct a bridge over Prairie Creek and one to construct a bridge over Ram River, both navigable waters, in connection with its forestry operations in central/western, Alberta. Regulations under the *Canadian Environmental Assessment Act* (CEAA) trigger a requirement for an environmental assessment (EA) to precede consideration of any such approval.[3] The Sunpine assessment process resulted in two Screening Environmental Assessment Reports, one for each approval application. The Respondents considered the Reports, and finding no likely significant adverse effects, issued the approvals to build the bridges. Shortly thereafter, Friends of the West Country Association (Friends) applied for judicial review. Although Friends sought judicial review on a number of grounds, this note focuses on Friends' request that the court declare the Screening Reports and approvals invalid on the ground that the Respondents failed to comply with statutory duties under CEAA.

Standard of Review

The standard of review that a court may use when considering whether or not a statutory delegate complied with a statutory duty can be crucial to the decision's outcome. If the issue before the court is a question of law, such as a matter of statutory interpretation, the correct standard of review is whether the statutory delegate's decision or action was right in law. However, if the issue is a question of an exercize of discretion or judgement, then the correct standard of review is whether the statutory delegate's action was patently unreasonable or not. Obviously the latter standard gives the court much less latitude in its review than the former. Regarding the judicial review issues this article focuses on, Gibson J. found the CEAA duty regarding determining scope of project to be a matter of discretion or judgment and subject to the patently unreasonable standard. However he found the CEAA duties involving determining scope of assessment and consideration of cumulative effects to raise questions of law and to be subject to the correctness standard.

Section 15: Scope of Project vs. Scope of Assessment

Scope of Project

In the case, s.15 of CEAA required the "responsible authority", allegedly the Respondents[4], to determine the scope of the project. According to the *Canadian Environmental Assessment Act Responsible Authorities Guide* a non-regulatory policy document prepared under CEAA, in "scoping" a project a responsible authority determines which components of a " ... proposed development should be considered to be part of the project for the purposes of the EA"[5]. The Respondents determined the scope of each project to be the bridge and associated approaches and works. The issues for the court were whether CEAA required them to include in each project the logging road attached to the bridge, and whether the two bridges constituted one or two projects.

The Court found that CEAA gives the responsible authority discretion to determine scope of project, and whether to consider the two applications as one or more than one project. Gibson J. stated that although he might have determined the matter differently, he could find no reviewable error[6] and would not interfere with the statutory delegates' exercize of discretion.

But, in the words of Gibson J. "...that is not the end of the matter"[7].

Scope of Assessment

In exercising their statutory duties to determine scope of assessments, the Respondents limited the scope of both EA's to the scope of the projects, namely the bridges and directly associated approaches and works. They did not include assessment of the roads to be constructed extending from the bridges. Gibson J. found this matter to involve a question of law and thus his inquiry was whether the Respondents correctly exercised their statutory duties.

Gibson J. noted that s.15 (3) of CEAA states that where a project is in relation to a physical work, the environmental assessment:

> ... shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment and other undertaking in relation to that physical work that is proposed by the proponent ...

Gibson J. found s.15(3) to be mandatory. He determined that the logging roads were constructions or undertakings in relation to the physical works – the bridges – and that therefore CEAA required the Respondents to include them in the scope of the EA's. They did not and accordingly failed to comply with the law.

Section 16: Cumulative Effects

Subsection 16(1) of CEAA provides that every screening shall include consideration of:

> ... the environmental effects of the project, including ... any cumulative effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out ...

Applying the legal standard of correctness. Gibson J. found that the Respondents erred in not including consideration of

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(Bridges and Roads - You Can't Assess One without ... continued from page 7)

the roads in the screening reports. He went on to say that "[s]imilarly, the evidence before me would appear to indicate that, with the approvals... the proponents proposed forestry operations in the West Country will also be carried out"[8]. He intimated, without determining, that the Respondents could also have considered forestry operations in cumulative effects. Later in the case Gibson J. suggested that a generous reading of CEAA would require the EA to extend to forestry operations.[9]

Conclusions

Based on the evidence and his analysis, Gibson J. stated:

> ...in the absence of a direct constitutional challenge to these provisions, and there is none here, I conclude that the environmental assessments were deficient ... [and] [t]hese deficiencies constituted errors of law in the essential statutory preliminary steps to the issuance of the approvals under the NWPA.[10]

He set aside the approvals and referred the EA Reports back to the responsible authority for redetermination in a manner consistent with CEAA.

Appeal?

It is not clear at the date of writing whether or not the decision will be appealed. However it is interesting to note that Gibson J. prefaced his conclusions by saying "in the absence of a direct constitutional challenge to these provisions". Perhaps the yet to be litigated issues are whether there are constitutional limitations on what a responsible authority may include in an EA, and the related question of whether there are constitutional or administrative law limitations on what the federal government may consider in the federal approval process.

Arlene J. Kwasniak
Staff Counsel
Environmental Law Centre

1. (7 July 1998) #T-1893-96 Calgary (F.C.T.D.)
2. R.S. C. 1985, c. N-19, s.5.
3. R.S.C. 1995, c. C-15.2 and *Law List Regulation* SOR/94-636
4. An issue in the case was whether the Respondents were in fact and law appropriate responsible authorities for the purposes of CEAA and for issuing approvals under the *Navigable Waters Protection Act*. Without determining the matter, the Court proceeded on other issues.
5. Ministry of Supply and Services Canada, Cat. No. EN106-25/1-1994, November 1994, referred to at p.21, *supra*, note 1.
6. In other words, he could find no patent unreasonableness.
7. *Supra*, note 1 at 27
8. *Supra*, note 1 at 29
9. *Supra*, note 1, at 31.
10. *Supra*, page 30.

New Faces at the ELC...

Welcome to New Board Members:

Garry Appelt, *Witten Binder*
Peter Lee, *Regional Director Alberta, World Wildlife Fund*
Al Schulz, *Regional Director, Canadian Chemical Producers Association*

Action Update

Shuffling the Deck - Provincial Environmental Service Reorganizes

The Environmental Service (previously the Corporate Management Service and Environmental Regulatory Service) of Alberta Environmental Protection (AEP) is in the process of reorganizing its structure and operations. This new service is primarily responsible for administration and implementation of the *Environmental Protection and Enhancement Act* and related regulations. Through this reorganization, the structure of the Environmental Service is shifted to one in which the bulk of services provided directly to industry and the public are provided regionally. This regionalization is compatible with similar structures established in the other AEP service areas: Land and Forest Service and Natural Resources Service.

There are now six regions covering the province, each headed by a Regional Director. These regions are responsible for the issuance of all approvals and registrations under the *Environmental Protection and Enhancement Act*. As well, the bulk of ongoing enforcement and monitoring activities will take place through these regions. Environmental protection orders and other enforcement and compliance actions will be implemented on a regional basis.

"Head office" divisions based in Edmonton will deal with environmental assessment, environmental sciences, enforcement and monitoring, and compliance matters (please see *Enforcement Briefs* on page 3 for further details on the new Compliance Division). The head office divisions are responsible for policy, standard setting and guideline development, provision of expert advice and support to the regions, and oversight to ensure consistency on a province-wide basis for approvals, enforcement and resource management.

A major stakeholder concern raised by the emphasis on regional services is that of consistency on a province-wide basis, particularly in relation to approvals. Bill Macdonald, Regional Director for the Northern East Slopes Region, has indicated that AEP will be expanding upon existing approval-related procedures to ensure continuity and consistency with the move to regionalization.

Currently, the new divisions and regions are dealing with staffing matters related to the reorganization. It is anticipated that details of the operations of the reorganized service will be developed over the balance of this year. Of interest will be the substantive details in relation to approvals and enforcement, and AEP's plans to address the consistency issue.

Cindy Chiasson
Staff Counsel
Environmental Law Centre

Reclamation Update

Based on input provided through a stakeholder consultation on proposed changes to the reclamation criteria for wellsites[1], the Ministers of Environmental Protection and Agriculture, Food and Rural Development have agreed not to implement the proposed process for reclamation audits "at this time"[2]. However, the Ministers' accompanying comments indicate that this is not a dead issue, and that the audit proposal may be resurrected at some future date. The proposed audit system would have eliminated the current system of field inquiries for wellsites in favour of a system where certificates would be issued upon satisfactory review of the application documents, with a percentage of sites certified subsequently being audited for compliance.

The Ministers also indicated that they want the wellsite reclamation process to include an informal appeal process involving local stakeholders, and a mandatory requirement for landowner involvement during the reclamation process. The proposal put forward during the consultation process suggested an informal appeal process in addition to the appeal to the Environmental Appeal Board, but did not provide details regarding the implementation of such an appeal.

The multi-stakeholder Steering Committee will continue with its review of the reclamation criteria, which includes field testing and monitoring of revised criteria this year. Upon completion of this review, the Committee will provide final recommendations on the criteria to the Ministers.

Cindy Chiasson
Staff Counsel
Environmental Law Centre

1 See *News Brief* Vol. 13, No. 2, p.5 "Government Proposes Move to Reclamation Audit System"

2 Letter, Lund and Stelmach to stakeholders, June 24, 1998

(Timber Permit Quashed to Protect Treaty Rights...continued from page 2)

are available for Canfor to log that would not interfere with Halfway's traditional uses and that the Crown did not meet its fiduciary duty to consult. The Court made a number of points regarding the duty to consult, which may be generalized as follows:

a) The Crown must consult prior to making any decision that may affect treaty or aboriginal rights,
b) The Crown must make all reasonable efforts to consult and must fully inform itself of relevant aboriginal and treaty rights as well as on the impact of the proposed decision, and
c) The Crown must provide the First Nation with information relevant to the proposed decision.

Application to Alberta

Since the case is a decision of the British Columbia Supreme Court, an Alberta court would not be bound by it, although it would influence an Alberta court. Moreover, the case relies on principles enunciated by the Supreme Court of Canada and it preceded the Supreme Court of Canada decision in *Delgamuukw* v. *British Columbia*[8] which quite favorably interpreted aboriginal rights (*see* last issue of *NewsBrief*).

The *Halfway* decision's relevance would center on any Alberta Crown dealings with off-reserve public land. Note that if the case's principles apply to Alberta, they should be apply not only to Treaty 8, but to the other numbered treaties since they all contain off-reserve hunting rights similar to Treaty 8. On the basis of the Halfway case, a cautious Crown would advise itself of traditional uses on off-reserve public land made by any Alberta First Nation. The Crown would consult with any potentially affected First Nation when the Crown is considering a public land disposition in an off-reserve traditional use area, whether the disposition be related to logging, grazing, oil and gas, water, mining etc.

However, a Crown following this case would do more than just consult. The *Sparrow* tests are not just procedural. They also are substantive. To be a justifiable infringement government must do more than consult. For example, according to *Halfway* if the government has a reasonable alternative to interference, not pursuing the alternative would go against the Crown's honour and the interference would not be justifiable. There are situations in which this principle could be applied in Alberta. An example would be if the Alberta Crown proposes to issue a logging, mining or grazing disposition that would interfere with an off-reserve treaty right and the Crown has a reasonable alternative to issuing the disposition. If the Crown nevertheless issues the disposition, the affected First Nation could apply to a Court to set it aside.

■ **Arlene J. Kwasniak**
Staff Counsel
Environmental Law Centre

1. [1997] 4 C.N.L.R. 45 (B.C.S.C.).
2. I thank Mike Callihoo, ELC summer law student, for his assistance in writing this article.
3. [1990] 3 C.N.L.R. 160
4. The Court primarily relied on Cory's J. summary of law in *Badger* [1996] 1 S.C.R. 771 at 793-794: Cory J. states, among other principles, that treaties are sacred agreements and a solemn exchange of promises. Treaty interpretation must maintain the integrity of the Crown, and ambiguities must be resolved in favor of the First Nation. Treaty words must be interpreted as the First Nation would have understood them at the time of signing.
5. Commissioner's Report Respecting Treaty 8, referred to in *Badger, ibid.* at 91
6. *Ibid.* at 64, referring to *R.* v. *Sampson* (1995), 16 B.C.L.R. (3d) 226;[1996] 2 C.N.L.R. 184 (C.A.).
7. *Supra*, note 1 at 65
8. (11 December 1997) #88-23799 (S.C.C.)

Public Lands and Forests Admin Penalties

The following administrative penalties over $1,000 were issued under the *Public Lands Act* and *Forests Act* since the last issue of *News Brief*.

- $2,100.23 to Tchir Forest Products Ltd. of Lac La Biche for unauthorized timber harvest in contravention of s.100(a) of the *Timber Management Regulation*.
- $1,678.90 to 747746 Alberta Ltd. of Manning for unauthorized use of public land contrary to s.47.1 of the *Public Lands Act*.
- $19,224.90 to Harmon Valley Grazing Association of Peace River for use of former lease and permit lands without authorization contrary to s.47(1) of the *Public Lands Act*.
- $1,630.56 to Morrison Petroleums Ltd. of Calgary for unauthorized use of public land contrary to s.47(1) of the *Public Lands Act*.
- $1,500 to Zeidler Forest Industries Ltd. of Slave Lake for contravention of the conditions of their operating permit contrary to s.100(a) of the *Timber Management Regulation*.
- $78,510.52 to Zeidler Forest Industries Ltd. of Edmonton for overcut of quota production in violation of s.22 of the *Timber Management Regulation*.
- $2,000 to S11 Logging Ltd. of Slave Lake for unauthorized timber harvest contrary to s.100(a) of the *Timber Management Regulation*.
- $5,109.60 to Kevin Cox of High Prairie and $1,284. to Pan East Petroleum Corporation of Calgary, both for unauthorized use of public land contrary to s.47(1) and s.47 respectively of the *Public Lands Act*.

By Andrew R. Hudson, *Environmental Law Centre*

Who Pays?

There is general agreement that those who degrade the environment should bear the costs of its remediation. Much of our environmental protection legislation in general and Alberta's *Environmental Protection and Enhancement Act ("EPEA")*, in particular is based on that principle. There may be times, however, when the legislation will require you to pay even if you don't think that you are a polluter.

Although this article focuses on who can be required to pay, some of the several ways this could happen under *EPEA* should be listed. There are three that immediately come to mind. Firstly, payment could consist of the costs involved in complying with environmental protection and enforcement orders. Depending upon the nature and extent of the contamination, this could be the most expensive payment of all.

The second way that payment can be extracted is through the criminal courts. If the act of polluting or subsequent conduct constitutes an offence, the polluter can be ordered to pay a fine or penalty or serve a prison term.

The final possible payment arises when the polluter's neighbors successfully sue and collect damages arising from the pollution. If the neighbors have been harmed by the pollution, they can recover damages against the polluter either under the common law or under statutes such as s. 122 of *EPEA*.

What follows is a listing of those who may be found liable under *EPEA* or otherwise to pay for pollution. It may be broader than you think.

1. Anyone having "charge, management or control" of the polluting substance can be required to pay. According to the definition of "person responsible" for a substance found in s. 1(ss) of *EPEA*. The definition expressly includes the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance . . .."

2. Those who employ others are generally responsible for civil wrongs and some crimes committed by their employees. This "vicarious liability" usually applies to acts committed during the course of employment. In situations where there is a high degree of danger, the responsibility may apply to independent contractors as well (s.239).

3. Owners are specifically mentioned in the definition of "person responsible" for a substance in s. 1(ss) of *EPEA* and in the definition of "person responsible for the contaminated site" in s. 96 (1)(c). Thus owners of either the spilled substance or the site upon which it is spilled can be required to pay.

4. Selling stuff before it pollutes or selling land before it is found to be polluted doesn't assure you that you will not be called upon to pay for pollution since previous owners are included in the definitions of person responsible for a substance and for the contaminated site.

5. Although, generally corporate officials are not liable for the acts of the corporation, officers and directors can be held liable for the offences under *EPEA* committed by the corporations they direct whether or not the corporation is prosecuted (s.218).

6. Provincial and municipal officials can be charged with an offence under *EPEA* for the conduct of those acting under their direction if the officials "knew or ought reasonably to have known of the circumstances that constituted the commission of the offence" and had the influence to stop or prevent it (s.219 (1)).

7. Receivers and trustees can be held liable for the party who is in receivership or whose property has been put into the hands of a trustee. There is a saving provision under the contaminated sites provisions which limits this liability (s.226(3)).

8. Lenders are not generally responsible for their borrowers' activities, however, they can, by contract, assume liability for receivers they employ. Also, if during the realization of any security, a lender is held to be in charge, management or control of a substance then the lender could be liable.

9. Those who take over the responsibility of a "person responsible" either under an assignment or under the laws of succession upon death of an individual or the demise of a corporation can fit within the definitions of "persons responsible" (s.1 (ss)(iii), 96(1)(c)(v)).

10. Executors may be liable for pollution caused by the deceased that they represent. They, however, have the same protection as is afforded receivers and executors with relation to contaminated site liability.

11. Any agent of a corporation faces the same liability as do officers and directors. In the right (or perhaps the wrong) situation an employee, contractor or advisor could be found to be an agent of a polluting corporation. In addition principals and agents of others who can be considered "persons responsible" can themselves be "persons responsible" (s. 1(ss)(iv), 96(1)(c)(vi)).

Water User Needs Information on the New *Water Act*

Dear Staff Counsel:
I own and operate a beef farm in central Alberta. I currently divert water from a stream flowing through my land to water my cattle. I also am interested in draining a large wetland on my property to increase productivity. I am concerned about how the procedures under the new *Water Act* will affect my present use and future plans. Can you explain the requirements I should anticipate?
Yours truly.
Concerned Farmer

Dear Concerned:
Before looking at the requirements you should be aware that the *Water Act* has not yet been proclaimed as law, though we except it to be proclaimed in late fall. To address your question, it will be useful to break it down into two main issues. The first concerns how your current diversion of water from the stream adjoining your land will be affected by the new procedures. The second concerns your interest in draining a wetland to increase productive land base.

Regarding the first, if you now hold a licence for the diversion then section 18 of the *Water Act* will deem your licence to continue. The Act provides that you may continue to exercise the right to divert water in accordance with the priority number assigned to the old licence and under the same terms and conditions of the old licence.

If you do not hold a license, then the Act allows for three possibilities. Section 21 allows riparian owners, such as you, to divert water from adjoining water bodies for household purposes. The maximum amount that may be diverted is 1250 cubic metres (100 acre feet) per household per year. This diversion cannot be registered, but does have priority over any licensees or other authorizations issued under the Act, except, of course, over other users for household purposes [s. 27]. The Act also allows riparian owners or occupants who divert water to raise animals or to apply pesticides on their farm, to divert additional water to a maximum of 6250m^3 (500 acre-feet) or the maximum amount specified in any "approved water management plan" for your area (see below), whichever is greater. This type of diversion can be registered without an expiry date, but registration is not required for continued use [s.19]. However, it is a good idea for you to register your diversion. If you don't register you will have no priority over other users, but if you do register your priority date will be the date of first known use (no earlier than July 1, 1894) [s.28]. Finally, if your current diversion exceeds the amount that may be diverted by a registration, then, for the excess, you must apply for a regular water diversion license that, if granted, will have a priority date of date of completed application [ss 51 and 29]. In deciding whether or not to grant a license, the Director must consider any relevant factors in the approved water management plan (if any) and may consider relevant matters including effects on the aquatic environment, hydrology, other users and public safety [s. 51].

For your information, an "approved water management plan" is a plan approved by Cabinet that a Director under the *Water Act* may in his or her discretion develop regarding water issues and policies for proposed water dispositions for an area [ss 1 and 9-11].

Regarding the second issue, you do not say how large or permanent is the wetland. You should be aware that subject only to narrow exceptions, under the Alberta *Public Lands Act*, the Alberta Crown owns the bed and shores of all permanent and naturally occurring water bodies [s.3]. If your wetland is permanent and naturally occurring for the purposes of that Act, unless one of the narrow exceptions apply, no matter what your title says, the land beneath it is not your land. If you want to determine whether you or the Crown owns the bed and shores of the wetland, you should start by contacting your local Alberta government Public Lands Services Branch.

Whether or not the wetland is permanent and naturally occurring, to drain it you will require authorization under the *Water Act*. This is because the *Water Act*, just like the *Water Resources Act* and predecessor legislation, regulates wetland drainage activities, whether a wetland is permanent or sporadically occurring. The *Water Act* considers drainage to be an "activity" and all activities require an approval unless exempted by the regulations. To apply for an approval you must submit an application that includes your plans and specifications to the assigned Director. The Director may either issue or refuse to issue the approval. In making the decision, the Director must consider any relevant factors in the approved water management plan (if any) and may consider relevant matters including effects on the aquatic environment, hydrology, other users and public safety [s. 38].

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