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Water Rights Under the *Water Act*

Introduction

The main purpose of this article is to describe the types of water rights under Alberta's new *Water Act*, which will come into effect on January 1, 1999. Most of these rights authorize the consumptive use of water and are granted to those who wish to take water from any watercourse in the province. All the categories of water rights under the *Water Act* can be explained either as a response to problems under the *Water Resources Act* or as a desire to respect rights that have been valid for up to a century. Each type of right under the new Act will be described in turn.

Household Users

The riparian users whose rights were preserved under the *Water Resources Act* have spawned two classes of successors: household users and traditional agricultural users. Previously, the quantity of water which a riparian could use for domestic purposes was not clearly defined and was open to generous and sometimes bizarre interpretations by riparian owners.

The approach of the *Water Act* was to quantify the riparian's right to domestic use precisely, so as to avoid excessive claims, and to re-name it, so as to minimize any confusion between the old common law right and the new statutory right to use water for household purposes.

Section 21 of the *Water Act* declares that a riparian has the right to divert water for household purposes, but only to a maximum of 1250 cubic metres (approximately 1 acre foot) of water per year.[1] This quantity is based on the average household use of a family of four and imposes a clear limit on the many claims to use larger amounts of water for domestic purposes under the *Water Resources Act*. Although the household right is limited, the Act clearly grants it a high degree of privilege, for it is given an unequivocal first priority in times of shortage.[2] The Act also provides a protected right for the same quantity of water to household users of ground water, who thus obtain a degree of legal protection for their use which they did not enjoy either at common law or under the *Water Resources Act*.[3]

This portion of the Act also ties up some legal loose ends by emphasizing that household users may not obtain a licence for their limited use and that, whatever their rights at common law or under the *Water Resources Act*, they cannot use any quantity of water in excess of 1 acre foot per year without obtaining a licence.[4] However, the other aspects of riparian rights at common law are expressly not affected by the legislation.[5]

This portion of the *Water Act* illustrates a dilemma that faced the drafting team on a number of occasions. In some regions, especially in southeast Alberta, domestic use can be critical and can consume the entire flow of some streams unless tightly regulated in the manner provided in the new Act. In contrast, in much of the northern half of the province and in the foothills, even generous domestic use poses no problems for water supply. As a result, it is important to note that the highly restricted household use is subject to

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The Editors

"any exemptions specified in the Regulations."[6] It is anticipated that a number of large exemptions will be made in areas of the province where there is ample supply of water for all consumptive uses, although none have yet appeared in the Regulations.

Traditional Agricultural Users

The strict limits on domestic use imposed by the *Water Act* meant that some users, especially in the agricultural community, would now be required to obtain a licence for water uses that they formerly carried on under the domestic use exception. This consequence created an outcry in rural areas, when many water users who thought that they had a valid right to use water without a licence realized that the new legislation required them to assume the bureaucratic burden of obtaining a licence.[7] This requirement created a potential inequity, because the licence would take priority only from the date of application, even if they had carried on a legitimate use in excess of 1 acre foot per year for decades. In contrast, the reaction from unlicensed domestic users of ground water seemed somewhat contrived. It is true that this constituency was now required to obtain a licence or risk a violation of the *Water Act*. On the other hand, it was very much in their interest to do so, in order to obtain legal security for the use of water which, under both common law and the *Water Resources Act*, could clearly be impaired with impunity by any other user.

The solution was the creation of a hybrid water right for those traditional agricultural users who are either riparians or ground water users. As long as they use water for raising animals or applying pesticides, traditional agricultural users can continue to divert up to 6,250 cubic metres (5 acre feet) of water per year without a licence.[8] This section also allows the maximum of 5 acre feet per year to be increased in particular regions through an approved water management plan. Their use thus continues to be legal, but it lacks security because it enjoys no priority and can be impaired by any subsequent user of water who interferes with their source of supply.

Rural practitioners in particular should be aware that traditional agricultural users can obtain full legal protection for their use of up to 5 acre feet per year in one of two ways. They can obtain a licence, but in that event they obtain priority only from the date of application. They can also obtain a registration, with a priority granted as of the date that water was first diverted for these purposes on their land. A registration is available under an expedited process that will be available for three years after the Act comes into force.[9] In summary, a traditional agricultural user thus has a right, through a combination of household and agricultural use, to a total of up to 6 acre feet of water per year without a licence and can obtain priority for 5 acre feet of that use if they choose to take advantage of the registration provisions.

Existing Licensees

Water rights have vested in existing licensees for over a century. The vast majority of licences were issued without term and were treated as if they were perpetual in nature. The government made it clear throughout the reform process that existing rights would be protected[10] and without this commitment it is doubtful whether the *Water Act* would have received the political support necessary to secure its enactment.

The protection of existing rights is accomplished by section 18 of the new Act, which states that all licences (and other forms of authorization) granted under the *Water Resources Act* and its predecessors are "deemed licences" and retain their original priority. The holders of deemed licences can continue to divert water in accordance with the terms and conditions of the deemed licence and the *Water Act*, with the critical proviso that if there is a conflict between the deemed licence and the Act, the licence prevails. Thus, for example, many modern licences on the South Saskatchewan River are subject to a requirement that the diversion of

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Enforcement Briefs

By Jillian Flett, *Alberta Environmental Protection*

R. v. *Chem-Security (Alberta) Ltd.*

(22 October 1998) #80534464P101-03, (Alta. Prov. Ct.)

On October 22, 1998 the Honourable Judge E.J. Walter issued his decision on the charges against Chem-Security (Alberta) Ltd. (Chem-Security) of 3 counts under the *Environmental Protection and Enhancement Act* (EPEA) in relation to releases of PCBs, dioxins and furans at the Swan Hills Waste Treatment Facility.

Count 1, under s. 98(2) alleged that the company released or permitted the release into the environment of a substance that caused or may cause a significant adverse effect. This count related to a release of PCBs, dioxins and furans from the flue gas stack of the transformer furnace between October 12 and 16, 1996.

Count 2, under s. 100(1)(c), alleged that between October 31 and November 8, 1998, the company failed to include in the report to the Director, information relating to the type and quantity of the substance released when that information was known or could be obtained readily.

Count 3, under s. 99(2), alleged that between June 3, 1996 and November 13, 1996, the company, being a person having control of the substance released into the environment, failed to report immediately the release to the Director, upon becoming aware of the release. This related to the results of a sample collected from the flue gas stack of the transformer furnace on or about May 27 and 28, 1996.

Chem-Security pleaded not guilty to all 3 counts. The Crown called evidence by way of an agreed statement of facts and a report from CANSPEC Materials Engineering and Testing. The defence made no submissions.

Although Chem-Security agreed that the release that took place had the potential to cause a significant adverse effect on the environment, it disagreed with the Crown on whether a significant adverse effect actually occurred. The accused was found guilty on all 3 counts. A sentencing hearing was held which included a tour of the Swan Hills Waste Treatment Facility. The judgement assessed a global penalty of $625,000 as follows: Count 1 - $400,000; Count 2 - $125,000; and Count 3 - $100,000.

The following aggravating factors were taken into account by the court in its decision:

- *the nature of the substances that were released.* The evidence presented showed that PCBs, dioxins and furans are some of the most toxic wastes known to man. Therefore, the court found that a great deal of expertise and care was required in their treatment. The court found that Chem-Security failed to properly supervise and inspect the work done to the transformer furnace to fix a possible leak in the flue gas duct. It was inexcusable and a flagrant breach of basic safety precautions and duties of care, that a significant change could be made to the facility in a critical area without proper supervision or without proper inspection prior to it being put into operation. However, the court did recognize that there was no willfulness, surreptitiousness or purpose on the part of Chem-Security.
- *the issue of significant adverse effect.* The court considered the following 3 factors when addressing this issue: the harm done to the public good, the consequences for those in the vicinity and the cost borne by the public as a result of the offense. The court found there was harm done to the common good and there was some harm to those in the vicinity. However, it did NOT find beyond a reasonable doubt, that there was actual demonstrable injury to people or animals (other than voles) in the vicinity of the facility. The third factor, namely the cost borne by the public, was not applicable or provable in this instance.

The following mitigating factors were taken into consideration:

- *the company's character.* Although there was a not guilty plea, both the parties agreed early that there would not be a lengthy and costly trial on the issues. This, together with the attendance of senior officials of Chem-Security and the parent company, spoke to the company's character and acceptance of responsibility.
- *the transformer furnace was shut down as quickly as possible.*
- *the fact that Chem-Security is under an enforcement order and has shown by its actions under the order that it is of good character.* It is of note that the court stated that the costs associated with the order should NOT be deducted or set off directly as against the amount of any penalty.
- *the company has a good record of self-monitoring and of providing reasonably reliable data in an expeditious manner.*
- *the company has destroyed millions of kilograms of hazardous waste.*

With respect to count 2, the nature of the offence was not that the company did not report but rather that it failed to report the nature and quantity of the substance that was released. The court considered the fact that the history between Alberta Environmental Protection and the company has made the

(Continued on page 9)

In the Legislature...

Alberta Legislation

The new *Water Act* will come into force on January 1, 1999.

The new *Limitations Act* will come into force on March 1, 1999.

Federal Regulations

As of August 26, 1998 there are new *Regulations Amending the Migratory Birds Regulations*. The amendment clarifies the definition of certain types of shot and extends the ban on the use of lead shot for hunting most migratory game birds to all of Canada by September 1, 1999. (*Canada Gazette Part II*, September 16, 1998, pp. 2403-2406).

The federal Minister of the Environment has issued an *Environmental Assessment Review Panel Service Charges Order* effective August 26, 1998. The Order is a cost recovery order, outlining how fees will be prescribed for panel review. An *Order Authorizing the Minister of the Environment to Prescribe Charges* has also been released.

The Pest Management Regulatory Agency has established Maximum Residue Limits for fluazuron in imported meat and meat by-products.

Alberta Regulations

The *Freedom of Information and Protection of Privacy Regulation* has been amended by an Order in Council. The amendment will ensure that local public bodies may exempt from disclosure specific information from *in camera* meetings.

The *Hydro and Electric Energy Regulation* has been amended by AR 144/98. The amendment adds a section addressing small power plants.

The regulations under the new *Water Act* have been published as the *Water (Offences and Penalties) Regulation*, AR 193/98 and the *Water (Ministerial) Regulation*, AR 205/98. Consequential changes have been made to other existing regulations.

There is an updated *Metallic and Industrial Minerals Exploration Regulation*, AR 213/98 and an updated *Exploration Regulation*, AR 214/98.

Cases and Enforcement Action...

The Supreme Court of Canada released a decision in *R.* v. *Klippert* that requires the defendant, operator of a sand and gravel mine now in the City of Calgary, to restore three acres of land to its original condition. It affirms the conviction by the Court of Queen's Bench and the sentence imposed by the Provincial Court (Criminal Division).

In *The Friends of the Oldman River et al.* v. *Minister of Fisheries and Oceans*, the Federal Court of Canada ordered the Minister of Fisheries and Oceans to comply with the *Fisheries Act* requirement that an annual report be produced and submitted to Parliament on the enforcement of the Act. An annual report must be prepared for 1995, 1996, and 1997.

The Federal Court of Appeal Chief Justice has dismissed the federal government's application for a "stay" of the ruling that orders a comprehensive environmental review of a logging road operated by Sunpine Forest Products near Rocky Mountain House. The Federal Court of Appeal will hear the case in the spring of 1999.

The Provincial Court sentenced Western Feedlots of Marsleigh to a penalty of $120,000 on the company pleading guilty to releasing more than 32 million litres of cattle pen runoff onto land that drains to a creek.

Following a plea of guilty, the Provincial Court fined Gerrit Van Asch $500 for cutting a hole in the side of an irrigation canal and allowing the release of manure and other livestock wastes from a lagoon designed to collect it.

The Provincial Court fined the Red Willow Hutterite Colony $2,000 after convicting the group on two charges under s.60 of the *Water Resources Act*. The colony failed to comply with orders from Alberta Environmental Protection concerning an unlicensed drainage project.

The Provincial Court sentenced Chem-Security, operator of the Swan Hills facility, to a $625,000 fine for the release of a substance (PCB's) that may cause a significant adverse effect ($400,000), failing to immediately report the release ($125,000), and failing to include the substance and quantity of the release in the report to the Director ($100,000).

The National Energy Board, in conjunction with Fisheries and Oceans Canada and the Prairie Farm Rehabilitation Administration, have submitted a *Comprehensive Study Report for the Alliance Pipeline Project* to the federal Minister of the Environment and the Canadian Environmental Assessment Agency. The Responsible Authorities concluded that the project, subject to specific recommendations and promised mitigation, is not likely to cause significant adverse environmental effects.

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

Codes, Regulations and Transition: A Snapshot of the New *Water Act*

The long-awaited *Water Act*[1] will come into effect on January 1, 1999. At that time, two companion regulations, the *Water (Ministerial) Regulation*[2] and the *Water (Offences and Penalties) Regulation*[3], and one code of practice, the *Code of Practice for the Temporary Diversion of Water for Hydrostatic Testing of Pipelines*, will also come into effect. It is expected that two other codes of practice, the *Code of Practice for Pipelines and Telecommunication Lines Crossing a Water Body* and the *Code of Practice for Watercourse Crossings*, will come into effect on April 1, 1999.

It should be noted that the new code of practice dealing with hydrostatic testing of pipelines is not the same as the *Code of Practice for Discharge of Hydrostatic Test Water from Hydrostatic Testing of Petroleum Liquid and Natural Gas Pipelines*, which is currently in effect pursuant to the *Environmental Protection and Enhancement Act* ("EPEA"). The code under that Act deals with the discharge of water that has been used in hydrostatic testing of pipelines; the new code under the *Water Act* ("the new Act") will deal with the withdrawal of water for use in hydrostatic testing of pipelines.

Transition to the New Act

The *Water Act* contains a number of transitional provisions designed to ease operations to the new regulatory system. Section 171 of the new Act deals with applications under the *Water Resources Act* ("the old Act") that have not reached the point of final decision at the time that the new Act comes into effect. Applications that are considered complete will continue to decision under the old Act, but the authorization that is issued is then deemed to be an approval, preliminary certificate or licence under the new Act. Applications that are not complete must be made under the new Act. The decision whether an application is complete rests with the person who would be authorized to receive the application under the old Act.

Sections 18-20 of the new Act address transitional matters in relation to various rights to water under the old Act. Section 18 deals with transition for diversion rights existing under the old Act, deeming those rights to be approvals, licences or preliminary certificates under the new Act, with priority numbers that correspond to the priority numbers under the old Act.

Section 19 continues rights for agricultural use of water, creating the category of "traditional agricultural user" under the new Act. This provision applies to owners or occupants of land adjoining water bodies or watercourses or with groundwater beneath their land, who are diverting water from those sources for agricultural uses at the time that the new Act comes into effect.

Section 20 deals with transition for authorizations and licences related to activities such as drainage, flood control, and erosion control. These are deemed to be approvals without priority numbers under the new Act. Permits issued under the old Act to authorize such activities for a specific time period continue as permits to which the old Act applies. Similar permits under the old Act that do not have an expiry date are deemed to be approvals under the new Act with an expiry date of January 1, 2000.

The new Act also includes transitional provisions related to regulations made under the old Act. Section 172 continues the *South Saskatchewan Basin Water Allocation Regulation*[4], which regulated the issuance of licences for reserved water in the South Saskatchewan Basin. Licences and preliminary certificates may be issued under the new Act for that reserved water, subject to the regulation. The regulation prevails over the new Act in cases of inconsistency.

Section 174 provides that the *Water Power Regulation*[5], which was made under the old Act, continues in force in relation to licences granted under it that are deemed licences under the new Act. However, that regulation ceases to apply to one of those licences once it has been amended under the new Act. Section 174 expires on January 1, 2002. The *Water Power Regulation* is otherwise repealed by the new *Water (Ministerial) Regulation.*

It should be noted as well that section 173 provides that reservations of water made under section 12 of the old Act continue in force. Licences and preliminary certificates can be issued under the new Act with respect to such reserved water, and applications for licences related to such reserved water must be made in accordance with the new Act.

A Bit about the New Regulations

The *Water (Ministerial) Regulation* deals with a range of matters. Part 1 addresses matters related to activities under the new Act, including the exemption of certain activities from approval requirements, and the incorporation of the codes of practice. Part 2 deals with diversions and transfers of water, including exemptions from licence requirements, and sets the boundaries for major river basins. Part 3 sets out the requirements for notice that must be provided pursuant to specific provisions of the new Act, and lists some exemptions to notice requirements.

Part 4 of this regulation sets out provisions for access to information under the new Act. These provisions are very similar to those found in section 33 EPEA and the *Disclosure of Information Regulation*[6] under that Act. It is interesting that these provisions were placed wholly within the regulation, which can be more easily amended, rather than in the new Act, which would have been similar to section 33 EPEA.

Part 5 of this regulation sets out procedures for appeals to the Land Compensation Board under section 158 of the new Act. Part 6 deals with requirements related to dam and canal safety, including plans, operating requirements, assessments and reporting. Part 7 deals with water wells, and incorporates the requirements currently set out in the *Water Well Regulation*[7]

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Electrical Restructuring: Alberta's Advantage is Dancing in the Dark

Introduction

This article will depart from the usual ***News Brief*** format of a tidy review of the legislative amendments to consolidate the *Electric Utilities Act* that were brought into force as of April 30, 1998. As Howard Samoil's replacement on the Electric Transmission Council I can offer no legal opinions. I undertook to keep the environmental representation at the Council alive and to monitor the unfolding of this critically important aspect of the much-touted Alberta Advantage. Reality - the reality proposed in the *Electrical Utilities Act* - and my perceptions of that reality require as much unbundling as the "natural monopolies" that dominate this sector of Alberta's economy.

Background

Two succinct ***News Brief*** articles by Howard Samoil (Vol 10 #2, 1995 and Vol 12 #3, 1997) have set the scene. In the latter, Howard correctly foresaw two issues that would carry serious environmental implications according to how they were played out in the transition to a fully competitive market for electricity: "end-user choice" and the removal of existing generation facilities from regulated service. Writing a year later, with all the bureaucratic elements of the new "deregulated" system in place (the consolidated Act now runs to 90 pages), it appears that the failure to have these issues resolved earlier rather than later in the process has created significant obstacles to the smooth transition anticipated by the Alberta Department of Energy, even without yet addressing any associated environmental concerns.

The Transition Period

October 25, 1998 was a black day for the Alberta Advantage. The Alberta Energy and Utilities Board's "Report on the Power Service Interruption" that day attempts to put the best face on it: "the power outage was due to operational problems, not to the current overall supply-demand situation or to deregulation of generation." And to listen to Minister West in the Legislature you would think it was intended to remind us to turn off our air conditioners and put up our Christmas lights.

The smooth transition failed. The AEUB is of course strictly correct to call this an operational problem, but a detailed reading of their report reveals the classic case of the latent vulnerability of all complex systems: a sequence of seemingly small and unrelated mechanical failures at different locations led to the loss of significant generating capacity, which then put to the test the recently installed System Controller, where flaws in forecasting, real time communication problems, coupled with jurisdictional dynamics, compounded to throw the system into emergency mode.

Notwithstanding operational problems, the AEUB's report recommends a dozen actions that the Transmission Administrator, the Power Pool and the Department of Energy itself will have to take to specifically address the new world of deregulation. Significantly, on the generation side of the equation, recommendation #11 to Alberta Energy reads: "the Department will lead an industry-stakeholder task group to ensure that new generation can enter the market in response to market signals and without facing artificial barriers to entry". What this recommendation quietly recognizes is what the Independent Power Producers Society has been trying to call attention to throughout the restructuring process.

But is this Really a Supply Side Problem?

In its focus on disentangling the vertically integrated regional monopolies of TransAlta Utilities, Edmonton Power and Alberta Power (who together sell 95% of the electricity in the province) the government has done little to address the distribution and consumer side of the equation. By recognizing transmission and distribution systems as "natural monopolies" that will remain regulated, Alberta Energy has inadvertently created a disconnect for the free marketplace of consumers that is supposed to drive future choices for generation. Hence the "demand side" of the market is still pretty much in the dark about what potential opportunities there may be for negotiating future electricity contracts through the Power Pool. The longer it takes for end-user choice to become a reality, the less opportunity there will be to steer the agenda to "greener" alternatives. "Business as usual" may provide a smooth transition but what it reflects is the continued dominance of the big players in the distribution and retailing side of the industry, albeit that they may or may not be operating through "arms length" companies. "The operation of the transmission system will be monitored to ensure that no conflict of interest occurs among generators and distributors who are linked corporately."[1] The question still remains "How?", given Alberta Energy's acceptance of "natural monopolies" and the weight of incumbency held by the companies. This issue of the level playing field becomes clear when you explore the price signals during the October 25th outage.

Potential Market Opportunities to Gain Demand-side Efficiencies

In fairness to the main players in the game, who are beset with conflicting demands and expectations, it is true that many of the problems identified in the AEUB's report are already on the table to be addressed. It has not been too hard for the industry to find the 400 MW of "new" power that has just been announced, despite the hiatus that has occurred over the past year in terms of Requests for Proposals for new generation. Close inspection of this "new" power reveals that Amory Lovins has finally arrived in Alberta: the big boys are cashing in on their "megawatts" that they hold at the distribution side of the equation. 210 of the 400 new MW are

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Case Notes

Coal Mine Opponent Jumps Preliminary Hoops

Bildson v. Acting Director of North Eastern Slopes Region Alberta Environmental Protection (19 October 1998) #98-230D (EAB)

You Snooze, You ...

As a prerequisite to appealing AEP approvals, Section 84(1) of EPEA requires a statement of concern to have been filed "in accordance with Section 70." Brian Bildson sought to appeal approvals granted to Smoky River Coal, but had earlier missed the 30-day deadline for filing a statement of concern.

For the purpose of the approval process, AEP treated Bildson's statement of concern as properly filed, thanking him for his submission and then advising him of its decision to issue the challenged approvals and of his right to appeal. Upon Bildson's appeal, AEP then took the position that the appeal was invalid because the statement of concern had been filed late.

Missing a statutory deadline or some other rigid appeal requirement usually means you're finished; judgements are numerous and unequivocal. Given an opening, though, courts will do various things to avoid that deadline, including not starting the appeal period until parties actually receive notice of the decision. Further, lawmakers increasingly provide courts and boards with discretion to relax appeal requirements where circumstances warrant.

Such discretion exists in Part III of EPEA, where Section 85.1 permits the EAB to extend time limits prescribed in that part on "sufficient grounds." And indeed, the EAB allowed the appeal over AEP's challenge that a statement of concern hadn't been filed in accordance with Section 70, even though Section 70 isn't in Part III, but rather Part II.

The question is whether the EAB can extend the deadline for filing a statement of concern to allow an appeal to proceed, or whether it was only the AEP's acceptance of the late statement of concern that validated the appeal. The EAB seems to favor the former, stating "...Section 85.1 appears to give the Board express authority to extend the 30-day deadline in Section 70(1), for purposes of allowing an appeal to proceed, whether or not the Director extended the deadline in his own decision process." But the Board leaves the potential open for the latter, stating "it is uncertain when or whether the Board might have 'sufficient grounds' under Section 85.1 for extending a Section 70 deadline, when the Director refuses to extend the deadline."

The EAB found AEP's acceptance of the late statement of concern "laudable and understandable, given the Act's recognition of the value of public consultation." What will happen if someone misses the statement of concern deadline and AEP does not consider the statement? Can that person appeal a subsequent approval by the Director? The definitive answer to that question will be left on the shoulders of some future would-be appellant whose late statement of concern is not accepted.

That Pesky Question of "Directly Affected"

The Bildson decision also provides some clarification respecting the ubiquitous "standing" issue. Bildson argued he was "directly affected" because his family used land and water around the mine for pleasure and for its "eco-tourism" business. AEP argued that because Crown land surrounds the mine, Bildson had "no legal right or interest distinct from any other person to this area."

The EAB reiterated that the appellant bears the burden of establishing on a preponderance of evidence that he or she is directly affected. The Board emphasized that an appellant's injury need not be unique to warrant standing: "The point is that the appellant must be directly affected; others may or may not be directly affected as well."

The EAB went on to confirm that an appellant seeking to establish that it is "affected" must prove that it will be "harmed or impaired" by the activity approved. The Board emphasized that "injury to hunting and recreational use could suffice to prove standing" and the fact that Bildson's use occurred on Crown land was no impediment to standing.

The Board's rationale is best evidenced by the following quotation: "What is 'extremely significant' is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant's use of a natural resource." This emphasis on use over legal entitlement will no doubt be cited in future submissions.

■ **Shawn Munro**
Bennett Jones

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Frank Liszczak
MacKimmie Matthews
Robin Robinson
Jerome Slavik
Tundra Holdings Ltd.

(Electrical Restructuring: Alberta's Advantage is dancing in ... continued from page 6)

"power arrangements" whereby industrial consumers or distribution companies have agreed to "interruptible" or "curtailable" load contracts with the Pool, something the Transmission Administrator has been attempting to finalize over the past months. Looking at the price signals at the Pool during the October 25 outage it is clear there is big money to be played with here. At 4 p.m. the system marginal price per MW/hour was $58.71 based on the bids contracted by the Pool; at 5 p.m. as the system began to go out of balance, higher bids were called in and the price rose to $80.87. At 5:15 p.m. a megawatt hour was worth $500 and a few minutes later the price hit its preset ceiling at $999. The AEUB reports that at 5:23 p.m. "a participant offers 150 MW of price responsive load and the System Controller takes this load off the system" and the system gradually recovered equilibrium.

Because of confidentiality, the report does not address in any detail the corporate bids in and out of the pool, (or who that particular participant was; could it have been the same one who refused a dispatch to shed 180 MW of load half an hour earlier?) and satisfies the reader with only general statements that there was no evidence of collusion, or excessive windfall profits. But the report from the Task Force indicates that TransAlta Utilities has entered into the first of these large scale agreements, making 100 MW of its load available to be dropped at 10 minutes notice. In so doing it has secured for itself a significant share of this newly emerging market. What is to be feared here is that decisions made now in haste to provide reliable power over the next few months will have serious adverse effects in dampening the opportunities for independent distribution and retail marketers to get a foot in the door on the load side of the equation.

What the report seems to miss is an opportunity to enhance the avowed thrust towards a more open and level market place by recognizing that if there were more independent purchasers of power for distribution and retail consumption there would be a greater likelihood that independent power producers could tailor production to specific demand and that this would also add to the flexibility available to the System Controller. Such flexibility could also enhance the ability of the system as a whole to shift to "greener" power generation through market choices that are presently unavailable to most consumers.

■ **James Tweedie**
Bert Riggall Foundation

[1] Enhancing the Alberta Advantage; A Comprehensive Approach to the Electrical Industry. Alberta Energy, 1994, similar statements can be found in subsequent AE documents

The opinions in News Brief articles do not necessarily represent the opinions of the members of the News Brief Advisory Committee or the Environmental Law Centre Board of Directors.

(R. v. Chem-Security (Alberta) Ltd......continued from page 3)

requirement for immediate reporting of all results very clear. The court stated that the company did not have the luxury or right to do internal investigations or retesting to verify results before making a full and immediate report of all information they have on the release. The court considered the same mitigating circumstances in this count as with count 1.

With respect to count 3 although the tests were not conclusive they did indicate the potential contamination of the flue gas with process gas. These test results were not reported to AEP. While Chem-Security did not believe a report was required, they were sufficiently concerned about the results that they made changes to the furnace duct which ironically were the cause of the major released referred to in count 1. The court considered the same mitigating factors as in counts 1 and 2. The court felt that failing to report a release should be considered in a serious light especially where the release is from a source where no significant emissions of PCBs would be expected. This was a case of a clear breach of duty where there was a potential for great damage or injury to the environment.

A creative sentencing hearing will be scheduled in the future wherein the court will determine how the global penalty of $625,000 will be allocated between the fine and the creative sentencing options.

(Codes, Regulations and Transition:..continued from page 5)

under EPEA. The new Act and this regulation take over the regulation of water wells and their drilling from EPEA, and repeal Part 6 of EPEA and the *Water Well Regulation*. Transitional provisions in this regulation deal with temporary permission to divert water under the old Act, which are deemed to be licences under the new Act, and approvals to drill water wells under EPEA, which are deemed to be approvals under the new Act.

The *Water (Offences and Penalties) Regulation* lists offences under the *Water (Ministerial) Regulation* and the codes of practice and establishes penalties for those offences. As well, it provides for the imposition of administrative penalties in relation to specified offences under the new Act and regulations and sets out the process for imposition of administrative penalties.

It should be noted that the two new regulations both contain "sunset" clauses providing for the expiry of each regulation on December 31, 2003. These clauses are stated to be for the purpose of ensuring review of the regulations for currency, and provide that the regulations may be passed again in their existing or amended formats after a review.

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

1. S.A.1996, c.W-3.5.
2. A.R. 205/98
3. A.R. 193/98.
4. A.R. 307/91.
5. A.R. 72/91
6. A.R. 116/93
7. A.R. 123/93.

Admin Penalties

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

- $5,000. to NOVA Gas Transmission Ltd. operating at Brooks, for transporting hazardous waste on two occasions without the required manifest and storing a vessel containing a hazardous waste in a place and manner contrary to regulation. The offences are in violation of s.182 and s.11 respectively, of the *Waste Control Regulation* under the *Environmental Protection and Enhancement Act.*
- $13,000. to Boucher Bros. Lumber Ltd. of the MD of East Peace No. 131 for failing to submit an air reduction report, failing to install a temperature probe, failing to install at least six dust fall monitoring stations, and failing to submit monthly reports, all required by their approval to operate. These offences violate s.213 (e) of the *Environmental Protection and Enhancement Act.*
- $1,500. to Celanese Canada Inc. of Edmonton for exceeding the daily industrial wastewater composite Total Organic Carbon limit in their approval to operate, contrary to s.213(e) of the *Environmental Protection and Enhancement Act.*
- $5,500. to Bodo Oilfield Maintenance Ltd. operating in Special Area 4. An uncertified, unsupervised employee applied the herbicide TORDON 22K, containing picloram to cropland in a manner that caused an adverse effect contrary to s.5(1) and 16(a) of the *Pesticide Sales, Handling, Use and Application Regulation* (AR 126/93). The Company is appealing the penalty.
- $6,000. to Parkland County where, on two occasions, an employee applied a pesticide containing picloram within 30 meters of an open body of water in violation of s.5(1) of the *Pesticide Sales, Handling, Use and Application Regulation* (AR 24/97).
- $1,000. to the Village of Mannville where prohibited debris was burned at a landfill site without an approval as required by s.59 of the *Environmental Protection and Enhancement Act.*

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

- for unauthorized removal of surface materials contrary to s.47 of the *Public Lands Act*, $3,600. to Cardy Oilfield Services Ltd. of Wabasca and $810. to C.Herman Trucking Ltd. of Slave Lake.
- $1,000. to George Ronald Dow of Niton Junction for inaccurate and/or incomplete hauling records while hauling timber in violation of s.118(1) of the *Timber Management Regulation.*
- $1,000. to Tolko Industries Ltd. of High Prairie for three improper watercourse crossings contrary to s.100(a) of the *Timber Management Regulation.*
- $2,728. to Rio Alto Exploration Ltd. of Calgary for unauthorized use of public land and contravention of terms and conditions of their lease contrary to s.47(1) and 47.1 of the *Public Lands Act.*
- $4,041.22 to Magin Energy Inc. of Calgary for unauthorized use of public land contrary to s.47(1)(a) of the *Public Lands Act.*
- $1,500. to Regent Resources Ltd. of Calgary for unauthorized use of public land and contravening terms and conditions of their lease contrary to s.47(1) and 47.1 of the *Public Lands Act.*
- $4,948. to Northrock Resources Ltd. of Calgary for unauthorized use of public land contrary to s.47(1) of the *Public Lands Act.*
- $2,000. to Paz Energy Ltd. of Calgary for contravention of the terms and conditions of their lease contrary to s.47.1 of the *Public Lands Act.*

(Water Rights Under the *Water Act*...continued from page 2)

water shall not be permitted unless a minimum residual flow of 1500 cubic feet per second is maintained in the river.[11] If the Minister were to set a higher minimum instream flow under the new Act, the holder of a deemed licence would be entitled to observe the lower minimum flow requirement specified in its licence.

There is no doubt that existing licensees are fully protected under the new Act, together with those who obtain water rights under other documents that are issued with varying degrees of formality under predecessor legislation.[12] The resulting inability to interfere with the rights of existing licensees means that it is virtually impossible for governments to impose minimum instream flow requirements in heavily allocated basins. In this respect, the rigidity of the old *Water Resources Act* remains and is mitigated only by a safety valve that is found in the transfer provisions in the *Water Act*.

New Licensees

The three categories of water rights just considered are all shaped by the history of the *Water Resources Act*. Only rights granted under the new Act are free from these historical fetters, but they are nevertheless deeply influenced by perceived problems of inflexibility in the traditional forms of water rights. Licences granted under the new Act incorporate administrative flexibility in two ways.

Section 51(5) of the *Water Act* specifies that all new licences must include an expiry date, determined in accordance with the Regulations, in order to avoid the restrictions on management that result from water licences that were issued for an indefinite term. The Regulations create an array of methods for determining the expiry date of a new licence which can be summarized as follows:

(i) the presumptive term of a new licence will be ten years, unless

(ii) the new licence is issued for one of four listed purposes: municipal, agricultural, irrigation or implementing a water conservation objective. New licences for these purposes will presumptively have a term of twenty-five years.

(iii) In all cases, an approved water management plan, ministerial order or water guideline can overcome these presumptions by specifying either a different expiry date or a different method of calculating the expiry date.

All expiry dates for new licences can be shortened if the applicant requests or if the Director feels that the life of the project will be less than the presumptive period. The expiry date of both categories of licences can be lengthened by the Director in the light of any one of a list of ten criteria specified in the Regulations.[13] All new licences are renewable and the Director may refuse an application for renewal only for one of six listed reasons.[14] In essence, the Director can refuse a renewal only on grounds of public interest or for environmental reasons, but not because the Director feels that the water should be used for another consumptive use. It is intended that if there is a competing use for the water, any person desiring that water should obtain it through the transfer provisions.

In marked distinction to the law covering old licences, the Act also allows the Director to make unilateral changes to new licences. However, this power is carefully circumscribed so that it does not unduly impair the security of new licences. The Director's only significant power of unilateral amendment arises where there is, or may be, an adverse effect on human health or public safety that was not reasonably foreseeable at the time the licence was issued.[15] This section does not significantly enhance the power that is already found under the *Water Resources Act* to suspend any licence in an emergency, though the *Water Resources Act* requires that the power must be exercised through Cabinet and requires the payment of compensation. It is also noteworthy that the final version of the power of unilateral amendment is much narrower than earlier drafts of the legislation, which would have allowed an amendment without the licensee's consent in the case of unforeseeable adverse effects on the environment.[16]

■ **Prof. David Percy, Q.C.***
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* This article is an excerpt from a paper presented by Prof. Percy at a joint Environmental Law Centre/Legal Education Society of Alberta seminar on the *Water Act* held in Calgary on October 23, 1998. Copies of the full proceedings are available from the Legal Education Society of Alberta (Alberta toll free 1-800-282-3900, fax (403) 425-0885).

1. The *Water Act*, s.1(v).
2. The *Water Act*, s.27.
3. See, e.g. Percy, "75 Years of Alberta Water Law: Maturity, Demise & Rebirth" (1996), 35 Alta. L.Rev. 221, 230-231.
4. The *Water Act*, s.21(1), s.22(1).
5. The *Water Act*, s.22(2),(3).
6. The *Water Act*, s.21(1)
7. *Report of the Water Management Review Committee* (Edmonton: Alberta Environment Protection, 1995) at 31, recommendation 31.1.
8. The *Water Act*, s.19(1)
9. The *Water Act*, s.28, s.73.
10. See e.g. *Water Management in Alberta, Discussion Draft of Legislation* (Edmonton, Alberta Environmental Protection, 1994)
11. See, e.g. Licence No. 19779, issued pursuant to the *Water Resources Act* on December 7, 1993.
12. The *Water Act* s.18(1), s.18(4) lists the varieties of other instruments which are protected under the new legislation.
13. The discussion in the text is based on the draft Water Regulation, available to the writer on October 1, 1998 (hereinafter cited as "the Water Regulation"), s.12.
14. The *Water Act*, s.60(3).
15. The *Water Act*, s.54(1)(a)(v).
16. *Water Management in Alberta, a Discussion Draft of Legislation* (Edmonton, Alberta Environmental Protection, 1994) s.56(1)(c)(i).

Practical Stuff

By Andrew R. Hudson, *Environmental Law Centre*

Keeping Secrets

Can you keep a secret? Even if you can you may find that you have to tell. You can be required to divulge information that you or your company thinks is confidential. I am not talking about water cooler gossip about an office romance, although under other circumstance that might be relevant. Since this publication is about environmental law let us talk about environmental secrets.

Some may want to keep secrets to avoid prosecution and penalties. Some may want to keep secrets to avoid liability to neighbours. Some may want to keep secrets to avoid embarrassment or public relations nightmares. Some may want to keep secrets to prevent others from profiting from them.

Others may want disclosure in order to protect the environment and human health, to facilitate enforcement of environmental laws or to make polluters pay.

This article provides examples of circumstances that may require you to reveal sensitive information. For specific concerns be sure to seek help from a lawyer. This can be a very tricky area.

There are several statutes that require disclosure of information relating to the environment. They include the *Environmental Protection and Enhancement Act,* the *Public Health Act,* the *Occupational Health and Safety Act* and the *Oil and Gas Conservation Act.*

For example, the *Release Reporting Regulation* under the *Environmental Protection and Enhancement Act* requires that a person who controls a substance that escapes into the environment must provide a written report. The Director receiving this report may also request additional information, which you will be obliged to give.

Inspectors and investigators under these statutes have broad powers to gather information, inspect documents and require the production of documents. It is generally an offence to fail to assist or give information to these officials.

Officials making these demands must, of course, follow the procedure set out in the legislation that authorizes them.

Some information that is supplied under these acts must be disclosed to the public. See, for example, section 33 of the *Environmental Protection and Enhancement Act* which applies, among other things, to information contained in applications, monitoring data, and reports.

Under *EPEA* the person required to submit information can make a request that it be kept confidential if it relates to a trade secret, process or technique provided that it is kept confidential by that person. It is up to the Director to decide whether the request is well founded. If it is not, the request will be denied.

An unsuccessful request for confidentiality can be appealed to the Environmental Appeal Board who may substitute its decision for that of the Director.

The *Rules of Court* require a party to a lawsuit to reveal all documents that are, or were, in that party's possession and that relate to the issues in the case. Therefore sensitive documents must be produced. In examinations for discovery, litigants can be required to disclose all the information that they have regarding the facts in issue. This includes information of officers and employees.

If a document was prepared in contemplation of specific litigation or was prepared by your lawyer in the course of providing legal advice it is generally privileged. Privileged information cannot be obtained without your consent. However, documents prepared in the usual course of business will likely have to be produced.

Documents that are produced are only available to the other parties to the action. Furthermore, the other parties cannot use the documents for any purpose other than the litigation without leave of the court.

The public can obtain information from you under the *Freedom of Information and Protection of Privacy Act.* Members of the public are allowed to access "records" in the custody of a "public body" which may include your sensitive information.

"Record" is broadly defined to include, among other things, information that is written, photographed, recorded or stored in any manner.

A "public body" includes Alberta government departments, designated agencies and local public bodies such as school boards and health authorities. Some information that you provide to these public bodies may be excepted from the access to information rules.

A public body has the discretion to release or withhold information for purposes of public safety, law enforcement, and relations with other governments.

However, a public body has no option but to refuse access to records containing commercial information of a third party. Similarly, a record that is subject to a legal privilege cannot be accessed under the Act.

Complaints about decisions made by public bodies go to the Information and Privacy Commissioner whose decision is final.

The moral: be prepared to spill your secret if your lawyer tells you that you must.

Neighbor Can't See the Forest for the Cows: Range Improvements and Timber Harvesting

Dear Staff Counsel:
My neighbour has a public lands grazing lease. He cut a number of trees on the grazing leasehold land for range improvement purposes, sold the lumber, and is making a financial profit from its sale. Does the law relating to public land address whether a leaseholder can cut trees and to whom profits earned belong, even when the profits relate to something outside of the primary reason for the lease?

Iva Beef

Dear Beef:
The Alberta government issues grazing leases on Crown land under the *Public Lands Act (R.S.A. 1980, c. P-30).* Under this act, the *Public Grazing Lands Range Improvement Regulation*, (Alta. Reg. 221/80), prohibits any holder of a grazing disposition, such as a grazing lessee, from carrying out any range improvements without prior written authorization from the government. Authorization to cut trees, which is considered a range improvement, takes the form of a timber disposition under the *Forests Act* (R.S.A. 1980, c. F-16).

According to the Public Lands Management Branch, "Most range improvement blocks involve enough timber that a Commercial Timber Permit or Deciduous Timber Permit is required. Most of the time these are issued through competitive auction/tender/draw by the Land and Forest Service – whatever the local normal practice is. Often the grazing lessee can take part in the competition, but he still does have to compete for the wood. Everybody must pay timber dues. The few exceptions to competitive allocation are when the demand for wood in the local market is low, or if the quantity is small – less than 60 cubic metres, generally. Fenceline clearing is one situation where this can happen. ..."

So, if your grazing lessee neighbour is legally cutting trees, he should have a tree cutting disposition. If you want to check this, you should contact your local Alberta Public Lands Services Branch.

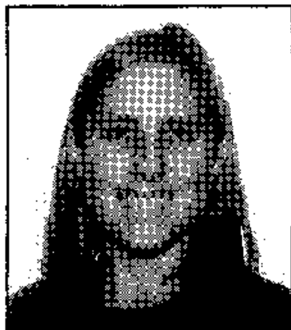
Assuming your neighbour has a disposition, he or she may harvest the timber and keep the proceeds. However if your neighbour has not been issued a tree cutting disposition, is cutting trees in excess of amounts permitted, or has not otherwise been authorized in writing to cut trees, then your neighbour could be guilty of an offence under the *Public Lands Act*, *Forests Act*, or *Timber Management Regulations* (Alta.Reg. 268/78). If you suspect that your neighbour has broken the law then you should first contact your local Alberta government Public Lands Services Branch for more information. If you determine that your neighbour does not have the right to harvest timber on his leasehold, you might also write to both the Minister of Environmental Protection and the Minister of Agriculture, Food and Rural Development, since both Ministers share responsibility over the *Public Lands Act*. If you are not satisfied with the actions taken by the local branch or the two Ministries, you might consider retaining a lawyer to investigate other avenues, including the potential for a private prosecution.

Finally, note that the MLA Agricultural Lease Review Committee Report recommends new approaches to managing timber resources on public lands. A copy of their Report should be available from either Alberta Environmental Protection or Alberta Agriculture, Food and Rural Development.

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:
Arlene Kwasniak

1998 Mactaggart Essay Prize Winners



Shauna Finlay

The Environmental Law Centre is pleased to announce the winning essays for the 1998 Sir John A. Mactaggart Essay Prize in Environmental Law. The first prize was awarded to Shauna Finlay from the University of Alberta for her essay: *Sustainable Development and the Canadian Environmental Assessment Act.* Second prize was awarded to Helen Cotton of the University of Saskatchewan for her essay: *McArthur River Uranium Mine Environmental Assessment Process.*

Members of the 1998 volunteer selection committee were: Alastair Mactaggart (Honourary), Paul Edwards (Chair) *Ballem MacInnes* and Douglas Graham *Macleod Dixon.*

The capital for this prize was donated by the Mactaggart Third Fund. Additional contributions were made by Carswell and the charitable donors to the Environmental Law Centre. For further information about the Mactaggart Essay Prize, contact the Environmental Law Centre.