News Brief

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In This Issue

The *Multilateral Agreement on Investment* and the Environment

Introduction

In 1995 the countries who are part of the Organization for Economic Co-operation and Development (OECD) began to negotiate an international agreement on investment known as the Multilateral Agreement on Investment (MAI). OECD nations intended to conclude and sign the MAI during 1997. However, in that year a coalition of non-governmental organizations (NGOs) protested against the MAI stating that it would lead to both a breach of international labour standards and to environmental degradation. The protest was so powerful that it stalled the OECD negotiations and countries commenced extensive inquiries which continue today into the potential impact of the MAI. This article briefly analyses the potential effect of the MAI as it is currently drafted upon the environment.

Investment and the Environment

International investment which is facilitated by an agreement such as the MAI has the potential to decrease the environmental consequences of development. International investment could lead to the transfer of clean technology to developing countries. It could increase peoples' living standards to such a level that they begin to demand better environmental protection and are willing to pay for it. It could lead to a more efficient allocation of resources. However, it also has the potential to increase the environmental consequences of development. It could exacerbate the market's failure to include environmental degradation as a cost of production. It could lead to an increase in overall consumption and negative scale effects. It could precipitate natural resource sell-offs in countries whose currency is destabilized by the rapid movement of short term investment. It could lead to the formation of pollution havens in toxic industries when countries are willing to lower their environmental standards in order to attract investment.

Due to its potential negative environmental impacts the MAI should permit countries to regulate foreign investment when it becomes clear that such investment is having a negative impact upon their environment. The most effective way for countries to do this in the face of globalization (which enables investors to move with ease between jurisdictions if they do not want to be bound by a particular regulatory scheme), is to negotiate an international code which makes investors responsible for whatever environment they operate in. However, as an international agreement represents a consensus, countries should also be permitted to implement different environmental measures when their population or specific environment requires it.

An International Code to Govern Multinationals

The MAI incorporates the non-binding *OECD Guidelines for Multinationals*. These guidelines set behavioural standards for foreign investors with regard to the environment and require investors to take account of the need to protect the environment within the framework of the laws of the country in which they operate. However, as the guidelines are non-binding and the MAI specifies that they will retain their non-

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(The *Multilateral Agreement*....continued from page 1)

binding status, they do not sufficiently govern multinational corporate behaviour to ensure environmental protection.

Protection for the Environment

The MAI provides for the protection of the environment in three places - in a not lowering standards provisions, in the preamble and in a provision which provides an exception to the prohibition on performance obligations requiring domestic content.

a) Not Lowering Standards Provisions

The MAI will probably incorporate one of several alternative provisions which recognize that it is inappropriate for countries to encourage investment by lowering environmental standards. None of the provisions is likely to have a substantial effect upon many countries' behaviour in regard to lowering or not enforcing their environmental laws. The provisions do not specifically prohibit countries from lowering their environmental standards and do not provide for effective dispute settlement if countries do.

b) Preamble

The MAI preamble will probably incorporate a reference to the fact that the parties intend to implement the MAI consistently with sustainable development. However, the reference to sustainable development is to that outlined in the *Rio Declaration* and *Agenda 21*. Neither of these documents reflects a clear picture of what making international investment sustainable will involve. In any case, the recent *United States - Import Prohibition of Certain Shrimp and Shrimp Products* decision of the WTO Panel and Appellate Body shows that the inclusion of sustainable development in the preamble of an economic agreement may not actually have a significant effect upon the interpretation of that agreement. The preamble also states that the MAI should be implemented in accordance with international environmental law. This may permit governments to protect their environment in accordance with environmental treaties regardless of the impact of this upon investment or investors.

c) Environmental Exceptions to Performance Obligations

The MAI permits countries to implement otherwise MAI illegal performance obligations in order to protect their environment. The performance obligations which will be permitted are those which require an investor:

> (b) to achieve a given level or percentage of domestic content; or
> (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from its territory.

The provision which allows states to implement these performance obligations states:

> Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in paragraphs 1(b) and (c) shall be construed to prevent any contracting party from adopting or maintaining measures, including environmental measures:
>
> > (b) necessary to protect human, animal or plant life or health;
> > (c) necessary for the conservation of living or non living exhaustible natural resources.

This provision is similar to Article XX of GATT. However, there is one important difference between the MAI and the GATT provisions. The GATT exceptions can exempt a GATT party from complying with any of its GATT obligations. The MAI exceptions are far more limited. They only exempt a party from the MAI prohibition on countries imposing performance obligations on investors requiring them to use a specific level of domestic content or use domestic goods and services - they do not provide a general exception to all MAI obligations. In their competition for foreign

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Enforcement Briefs

By Jillian Flett, *Alberta Environmental Protection*

Courts Consider Polluter Profits in Sentencing

In three recent cases, Alberta courts have recognized the need to account for the environmental implications in sentencing for economic crimes and to account for the economic benefits associated with environmental offences. They have also considered how court sentences can both deter the individual and public from future offences, and remove the profit resulting from the commission of the offence.

In two cases involving economic crimes, the accused were found guilty under the *Criminal Code* of theft over $5,000, for illegally cutting timber from Crown land. The courts considered both the value of the amount of the timber stolen and also the value of the reforestation (environmental) costs in determining the amount of the theft. In both cases, the accused were found guilty of theft even though the government was able to recover the money and/or the logs so that the accused did not receive any actual monetary benefit from the crime.

In a third case the accused was found guilty of an environmental crime which was undertaken for economic benefits. The accused was found guilty under s.156 of the *Environmental Protection and Enhancement Act* (EPEA) for illegally applying pesticides by air. The court ordered that the monetary benefit from the illegal activity be added to the total amount of the penalty, even though the accused had not received any payment. This is one of the few occasions where s.216 of EPEA has been used to take away the profit associated with an illegal environmental activity.

In the first timber theft case, *R.* v. *Machell*[1], the Crown argued that this was both a financial and an environmental matter. Although the accused was charged with theft of timber, there are environmental implications associated with logging including increased erosion and the need for reforestation. This raised the issue of the value of the theft. The value of the timber cut was $526,000 and the cost of reforesting the site was $28,000. The Crown argued that the value of the theft was the value of the trees plus the cost of remedying the environmental implications associated with the logging (i.e. reforestation cost). The defence argued that this should not be characterized as a $500,000 theft because the government was not out of pocket except for the environmental costs of the trees being cut.

The court found that the value of the timber was not reduced by the fact that the Crown was able to recover most of the proceeds of the improperly taken timber. The court agreed that this was theft of public property and that there must be both a specific (individual) and a general deterrent imposed. A sentence of 30 months incarceration was imposed.

In *R.* v. *Air Agro and Lynn Steadman*[2], the court considered the economic factors associated with an environmental offence. The corporate accused was found guilty of 5 counts of applying the pesticide Roundup, in contravention of the regulations and label for the pesticide. The charges were stayed against the individual accused.

The Crown again argued that this was mainly an economic issue that had environmental consequences. Although use of this pesticide was allowed, it must be used in accordance with the regulation to limit environmental implications.

The court recognized that the company had willfully committed the offence to promote business and thereby increase its profits beyond what it would have made from the specific spraying incident.

In sentencing, the court distinguished between a penalty that tries to deter the individual and others from breaking the law and one that simply takes away the profit of the illegal activity. Although the offender had not yet been paid and therefore had not actually received any profit from the illegal activity, the court took into consideration that it was possible that the accused might initiate civil proceedings to recover the outstanding bill. The court found that the $15,000 outstanding bill was the monetary benefit which would accrue to the company and this was included as the first part of the sentence.

The court then looked at an appropriate sentence for the deterrent aspect of the penalty. The court took into consideration that this was the third time the company had been convicted of similar environmental types of offences as well as the fact that the offence had been conducted willfully to attract more business. An additional fine of $15,000 was assessed for the deterrent aspect of the penalty, thereby resulting in a total penalty of $30,000.

In the case of *R.* v. *Lorne Waldie and Hi-Sky Enterprises Ltd.*(carrying on business in Alberta as Thunder Mountain Developments Ltd.)[3] the corporate accused plead guilty to theft over $5,000 and charges against the individual were stayed.

The value of the timber theft was approximately $126,000, which was composed of the timber value of around $70,000 plus the cost of reforestation of $56,000. The government managed to recover the payment of $200,000 from the mill, which exceeded the value of the theft by $74,000.

In speaking to sentence, the Crown recommended the approach in the Air Agro case as the appropriate way to deal

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In Progress

In the Legislature...

Alberta Legislation

Bill 4, *the Surface Rights Amendment Act, 1999* received Royal Assent and will come into force on September 1, 1999. It increases government powers to take action against individual oil companies that are delinquent in making compensation payments to landholders.

Federal Regulations

Effective March 4, 1999, Schedule I to the *Canadian Environmental Protection Act,* which lists toxic substances, has been amended to include 13 more substances. (*Canada Gazette Part II*, March 17, 1999, pp. 688-689.)

The *Pulp and Paper Effluent Regulations* were amended to allow an additional year for pulp and paper mills to provide the federal government with Environmental Effect Monitoring studies. The studies are now due on April 1, 2000. (*Canada Gazette Part II*, April 14, 1999, pp. 1115-1117.)

Alberta Regulations

The *Environment Delegated Authorities and Management Bodies Amendment Regulation* (AR 68/99) is in effect as of March 10, 1999. This Regulation amends a number of regulations to require delegated administrative organizations to comply with the *Freedom of Information and Protection of Privacy Act* in carrying out their duties. The amended regulations are:

- the *Beverage Container Recycling Regulation* (AR 101/97),
- the *Lubricating Oil Material Recycling and Management Regulation* (AR 82/97),
- the *Tire Recycling and Management Regulation* (AR 206/96),
- the *Forest Resources Improvement Regulation* (AR 152/97), and the
- *Wildlife Regulation* (AR 143/97).

(*The Alberta Gazette Part II*, March 31, 1999, pp. 260-266.)

The *Water (Ministerial) Regulation* (AR 205/98) has been amended to change the effective date for the *Code of Practice for Pipelines and Telecommunication Lines Crossing a Water Body* and the *Code of Practice for Watercourse Crossings*, from April 1, 1999 to December 1, 1999. Sections 3 and 4 also come into force December 1, 1999. (*The Alberta Gazette Part II*, April 30, 1999, p.322.)

Cases and Enforcement Action...

A Court of Queen's Bench decision reduced the fine assessed to Hans Mullink and Cool Spring Dairy Farms Ltd. of the M.D. of Fairview No. 136. Both had been charged with violations of s.213(f), (g) and (e) of the *Environmental Protection and Enhancement Act*. The court decision reduced the fine for contravening an Enforcement Order and for each of four counts of contravening the terms of an Approval from $5,000. to $2,500. on each. The court also altered the terms of the Order.

A Provincial Court Judge sentenced Agrium Inc. to a total penalty of $150,000 after the Company pled guilty to two charges related to its approval to operate a fertilizer plant at Carseland. The first charge was for exceeding emission levels for nitrogen dioxide ($25,000) and the second was for failing to report the incident immediately ($125,000). Both infractions are of the *Environmental Protection and Enhancement Act*.

A Provincial Court Judge sentenced Aero Paint Canada Inc. of Edmonton to a $10,000 fine and a creative sentencing order after the company pled guilty to consigning hazardous waste without a manifest. The creative sentence requires the Company to build secondary containment for its stored drums of waste and recyclable materials, conduct external audits twice a year, and keep additional records for a period of three years. These records are to be made available to Alberta Environmental Protection on demand. The cost of the creative sentence has been estimated at $12,000. The charge is an infraction of s.182 of the *Environmental Protection and Enhancement Act*.

The Alberta Energy and Utilities Board released an Order granting costs to the Oilsands Environmental Coalition recognizing the group as local interveners in the Shell Canada Muskeg River Mine Project Application. The Board ruled that one of the coalition's constituent groups had members who are residents of Fort McMurray "and whose lands might be directly and adversely affected by the cumulative air pollution experienced at Fort McMurray as a result of the proposed Shell oil sands operations."

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Occupier's Liability and Natural Land

Introduction

The Alberta *Occupiers' Liability Act*[1] (OLA) requires occupiers to take such care as in all the circumstances of the case is reasonable to see that visitors will be reasonably safe in using the premises for the purposes for which they are invited or permitted by law to be there. What does this duty amount to when the premises are natural or primarily natural areas, and the purposes for the visit are casual recreational? Does the duty, for example, require an occupier to remove rocks, tree roots, fallen wood and so on from trails in a natural woods if he or she invites a visitor to walk in the forest? Although the answer to this question is not clear, courts have provided some interpretive guidance.

Foreseeability and unusual v. commonplace

First, in determining the duty imposed on the occupier to take care for the safety of visitors, courts will ask whether or not the danger was reasonably foreseeable. Courts ask this question since the legal duty is that occupiers protect visitors from *unusual* dangers. Some cases suggest that the OLA would not impute liability on occupiers in respect of commonplace "dangers" such as natural slopes or sharp curves.[2] However other cases suggest otherwise.[3] Although courts have often noted that occupier's liability legislation is not meant to make occupiers insurers, lack of objective clarity about what constitutes a usual and unusual danger, could so render them.[4] The problem is that it is somewhat a matter of perspective as to what constitutes a commonplace and what an unusual danger. Is a tree root protruding onto a trail an unusual or commonplace danger? Avid recreationalists likely would say usual, but a judge using sidewalks or streets as paradigm walking surfaces might say "unusual".

Foreseeability and ordinary sensitivity

Second, in determining whether a danger was reasonably foreseeable, courts will consider a person of ordinary sensitivity, and not an overly sensitive person. So, for example, a visitor who was alarmed by the barking of a large dog, and who fell off a step and broke her leg, did not recover under occupier's liability legislation.[5] Here the court reasoned that a person of ordinary sensitivity would not get so alarmed at the barking of a dog.

Occupier no insurer

Finally, as noted above, courts have stated that occupier's liability legislation should not render occupiers to be insurers. Courts have indicated that plaintiffs have an obligation to look after their own safety. Those who fail to look out for themselves might not be able to recover under occupier's liability legislation. For example, the Alberta Queen's Bench Court found no breach of duty when a customer at a tree farm tried to step over a hole where a tree was removed, failed, fell in and broke his leg.[6]

Applying the guidance

How does this court rendered guidance aid in addressing the question of whether occupier's liability legislation imposes a duty on occupiers to keep natural, or primarily natural premises free of natural hazards? On the one hand, the guidance would suggest that occupier's liability legislation does not require, for example, Elk Island Park to clear the area of bison. Bison are a commonplace hazard in the park, indeed a main attraction. Yet, it would not absolve the federal government from taking steps to remove unusual dangers, perhaps, bison freely roaming in the children's playground.

Unfortunately, however, applying the guidance will not yield clear answers to hard questions. For example, is a private landowner who allows visitors on the property for casual recreational purposes, say bird watching, liable if a bird-watcher slips down an unfenced embankment? Neither the legislation nor the case law guidance gives a clear answer. One judge might find an embankment to be commonplace and another unusual. A particular judge could find that the Plaintiff ought to have been looking out for herself, but another might find that the occupier breached the common duty by not fencing off the embankment.

■ **Arlene J. Kwasniak***
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* This is an excerpt from *Occupier's Liability, Trails and Incentives* by Arlene Kwasniak which is now available from the Environmental Law Centre. The publication provides an analysis of how current occupier's liability law could be changed to address the concerns discussed in this excerpt while not compromising valid potential plaintiff interests.

1. R.S.A. 1980, c. 0-3.
2. For example, *McErlean* v. *Sarel* (1987), 42 C.L.T. 78, and *Ewen* v. *Archerwill (Village)* (1988), 68 Sask. R. 224 (Q.B.) and *Gallant* v. *Roman Catholic Episcopal Corporation* (1993) [referred to without complete reference on <<www.bensonmyles.com/gallant.html>>.] The last mentioned case (from Newfoundland) was determined under the common law relating to occupier's liability. However, it turned on whether a slippery ice and a slope were unusual or not.
3. See, for example, *Samis* v. *Vancouver (City)*, [1989] B.C.W.L.D. 1010, and *Waldick* v. *Malcolm*, *supra*, note 6.
4. For example, *Brandirick* v. *Calgary, Dahdda et al.* (1986), 69 A.R. 46.
5. *Nasser* v. *Rumford* (1977), 5 ALR (2d) 84 (C.A.), reversing (1977), 2 C.C.L.T., 209 (T.D.).
6. *Charko* v. *Hall (Wm.) Tree Farms Ltd.* (1991), 113 A.R. 161 (Q.B.).

Case Notes

Forewarned is Forearmed: Appellants Need to Move Carefully in Establishing Appeals

Parry et al. v. *Regional Director, Northern East Slopes Region, Alberta Environmental Protection, re: Cardinal River Coals Ltd.* (18 January 1999) 98-246 & 98-248-D (EAB)

This Environmental Appeal Board (EAB) decision deals with two different appeals of the Director's decision to issue an approval to Cardinal River Coals under the *Environmental Protection and Enhancement Act* (EPEA) for the Cheviot mine near Hinton, Alberta. Both decisions highlight practical concerns that may waylay unsuspecting appellants to the EAB.

The Parry Appeal

Parry had appealed on behalf of the Rocky Mountain Cree Smallboy Camp (the Camp). The sole ground of appeal was that the Director, in deciding whether to issue the approval, had failed to consider the Camp's challenge of the Cheviot mine in the Federal Court. The Camp is pursuing an action in the Federal Court asserting aboriginal title to lands potentially affected by the Cheviot development[1]; one of the remedies sought in that action is to enjoin the federal government from allowing or otherwise permitting any development in the area.

The EAB dismissed this appeal as being without merit. It found that the Camp's Federal Court action involved only the federal government and not the province of Alberta as a party. The EAB further held that there was nothing within EPEA that would preclude the Director from issuing an approval where there was a concurrent related action in the Federal Court.

In an obiter point, the EAB discussed the level of consideration that was given to the Federal Court action by the Director in deciding whether to issue the approval. The statement of objection filed by Parry with the Director only made reference to an action in the Federal Court, and did not provide any further information such as the style of cause or action number. The EAB stated that this information was insufficient to allow the Director to take the court action into consideration in making his decision. It also indicated that where a citizen raises a concern as being worthy of the Director's attention for decision-making purposes, the onus then lies with the citizen raising that concern to explain and support it "to the extent possible and reasonable".

The Ladouceur Appeal

Ladouceur's notice to the EAB sought to appeal "the decision to go ahead with the Cheviot mine". The EAB dismissed this appeal on the basis that it did not meet the requirement that the appellant had filed a previous statement of concern, as set out in section 84(1)(a)(iv) EPEA. Ladouceur had submitted a letter of concern to Alberta Environmental Protection related to a *Water Resources Act* (WRA) permit for the Cheviot mine. The application for the EPEA approval had been advertised in a separate notice together with notice of a second WRA permit for the mine.

The EAB reviewed that letter of concern and held that it did not qualify as a statement of concern with respect to the approval under appeal. The letter referred to the WRA permit and was addressed to a different official than the one designated to receive statements of concern for the EPEA application for approval. Given those differences, the EAB stated that it was not possible to construe Ladouceur's letter of concern as a statement of concern with respect to the application for the EPEA approval, and held that Ladouceur had not met the requirement of filing a previous statement of concern in the matter under appeal.

The Effects for Appellants

These decisions highlight how important it is for potential appellants to be mindful of appeal requirements early in the regulatory process. The EAB's comments on the Parry matter and the raising of matters with the Director clearly relate to issues and concerns that will most likely be raised by citizens in statements of concern. At that stage, many citizens are primarily focused on ensuring that their concerns are stated, and may not give much attention to the strategic implications of how they state or present their concerns.

Similarly, many individuals in a position similar to Ladouceur's may not have the background knowledge or regulatory sophistication to recognize that they may need to file more than one statement of concern with respect to a development in order to safeguard their future appeal opportunities. This is particularly likely in situations where the public notice refers to multiple applications under different Acts.

To safeguard themselves, citizens concerned with developments that require an approval under EPEA should begin thinking of the possibilities of appeal from the earliest stages of the approval process and plan their actions in accordance with any possible appeal. It is sobering to think that, if the EAB applies these decisions strictly, otherwise valid appeals may be prevented from proceeding due to a lack of sophistication and advance planning on the part of the appellants. Surely this was not the intent of the provincial government in creating the appeal process under EPEA.

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

[1] Wayne Roan et al v. Canada, T-1576-97 (F.C.T.D.)

EAB Reduces Administrative Penalty for Pesticide Application

Bodo Oilfield Maintenance Ltd. v. Director, Enforcement and Monitoring Division
(16 April 1999) 98-247-D (EAB)

Compared to prosecutions, administrative penalties play a less prominent role in environmental enforcement in Alberta. In contrast, jurisdictions in the United States are relying increasingly on administrative penalties as a less costly and more certain means of punishment and deterrence.[1] Because the defence of due diligence, which is often relied on in environmental prosecutions, is unavailable for administrative penalties, fines are less and accused do not face incarceration.

In reducing an administrative penalty levied by Alberta Environment (AE) for unauthorized pesticide application, the Environmental Appeal Board (EAB) has further clarified the test for assessing administrative penalties. In this case, Bodo Oilfield Maintenance Ltd. sprayed the wrong lease site by mistake. The pesticide sprayed was Tordon 22K, which contains picloram, a highly potent substance that persists in soil and water and is harmful to plants at even undetectable levels.[2]

To compound the problem, the pesticide was sprayed by an uncertified applicator in a manner contrary to the Tordon 22K label. As a result, Bodo was charged under the *Pesticide Sales, Handling, Use and Application Regulation* for applying a pesticide in a manner likely to cause an adverse effect – specifically for broadcasting Tordon 22K over a large area, rather than spot treating. Further, Bodo was charged under the Regulation for the application of the pesticide by a non-certified and unsupervised applicator. In launching its appeal, Bodo admitted contravening the regulations but challenged the penalty, asserting it was too severe under the circumstances.

To provide a measure of certainty and consistency in assessing administrative penalties, the *Administrative Penalty Regulation* adopts a table ranging from $1,000 - $5,000 per daily offence. The fine is calculated by taking into account both the degree of variation from the regulatory requirements, as well as the potential for adverse effect. Each of the two criteria is classified as minor, moderate or severe; for example, a major variation from the requirements entailing a major potential for adverse effect entails the highest fine.

AE initially found that damage to vegetation justified classifying both offences as having a major potential for adverse effect. AE determined that the variation from the regulatory requirement was only moderate since the contravention was only a performance restriction, rather than an environmental restriction. Upon considering the factors listed in 3(2) of the Regulation, including wilfulness or negligence, mitigation, past offences, and whether an economic benefit was derived, AE reduced the penalty from $8,500 to $8,000. The Director later considered sampling which tested below detectable limits for picloram, and further reduced the fine to $5,500 by classifying the potential for adverse effect as more moderate than initially determined.

On appeal, the penalty was further reduced to $3,750. The Board acknowledged a measure of deference to AE, indicating it would not interfere with the Director's decision if appropriate factual inquiries were made, written reasons reflecting a considered response were provided, and an opportunity was given to present contradictory facts and an explanation. In this case, the appellant met its burden of satisfying the Board that the Director's decision did not meet those criteria. Perhaps looking ahead to future cases, though, the Board indicated that absent moderating factors in this case, it considers the failure to use a certified applicator to be a major variation from the regulatory requirement.

■ **Shawn Munro**
Bennett Jones

1. See for instance Dianne Saxe, "Civil Penalties Come to Canada" *Hazardous Materials Management*, April/May 1999.
2. See Brian O'Ferrall, "Dow Chemical Found Liable for Herbicide Damage: *Van Oirschot v. Dow*" (1993), 3 J.E.L.P. 214.

Public Lands and Forests Admin Penalties

The Land and Forest Service of Alberta Environment issued the following administrative penalties of $1,000 or more for offences under the *Public Lands Act*:

- $3,000. to Renaissnace Energy Ltd. of Calgary
- $1,680. to Crestar Energy Inc. of Calgary
- $10,227.66 to Gordon Buchanan Enterprises Ltd. of High Prairie

and the following administrative penalties of $1000 or more under the *Forest Act* or *Timber Management Regulations*:

- $4,000. to River Valley Lumber of Fort Assiniboine
- $3,000. to Blue Ridge (1981) Ltd. of Whitecourt
- $4,000. to ATN Holdings Ltd. of Fort Assiniboine
- $10,652.40 to Skyline Industries Inc. of Calgary

The Service also gave notice it has withdrawn the following penalty assessments of January 19, 1999:

- $1,900. issued to Millar Western Industries Inc. of Boyle,
- $2,000. assessed to Talisman Energy Inc. of Calgary and
- $2,000. assessed to The Wiser Oil Company Ltd. of Calgary.

Court Sets Aside Director's Decision Varying Approval

Stelter v. *Director, Environmental Sciences Division, Alberta Environmental Protection* (9 February 1999) #98-243D (EAB) *Stelter;* v. *Director of Air and Water Approvals* (22 April 1999) Edmonton 9903-01015 (Alta. Q.B.)

When a departmental Director apparently disregards an order of the Minister of Environment accepting a decision of the Environmental Appeal Board, what is the "successful" appellant to do? According to two recent decisions, one by the Environmental Appeal Board (EAB or the Board) and the other by the Alberta Court of Queen's Bench, the remedy lies with the courts through judicial review and not with the Board.

Background

G.M.B. Property Rentals ("GMB") owns and operates a mobile home park east of Hinton, Alberta. A sewage lagoon and waste disposal system provided by GMB resulted in the discharge of effluent into the McLeod River, via a pipeline, all of which was authorized by an approval issued under the Alberta *Environmental Protection and Enhancement Act* (EPEA)[1]. In 1997 GMB applied for and was granted a variation to its approval, authorizing the open flow movement of effluent through a creek and drainage ditches rather than through the pipeline. The net benefit to GMB was that it would no longer have to rent a pipeline to discharge effluent into the river. Unfortunately, this benefit came at a cost to an adjacent landowner, Richard Stelter. The creek and drainage ditches to be employed in the new effluent discharge scheme crossed over Mr. Stelter's property and, perhaps not surprisingly, he appealed the variation to the EAB.

The appeal was successful and the EAB issued a report to the Minister of Environment recommending that the approval be varied to provide for a method of discharge that would "...not infringe the valid interests of the appellant..."[2]. By Ministerial Order, the Minister accepted the recommendations of the Board and ordered implementation. Accordingly, the Director issued a Variation of Approval, purporting to do just that. In fact, the amended approval still authorized the discharge of effluent to the "...unnamed creek under the circumstances indicated in the variation."[3]

Mr. Stelter appealed the Variation of Approval to the EAB on the grounds that the Director had failed to comply with the Ministerial Order, approving and accepting the recommendations of the Board.

No Right of Appeal - the EAB Decision

The jurisdiction of the EAB to consider a further appeal was called into question by the Director who argued that the Variation of Approval was action taken pursuant to s.98 and not s.67 of EPEA and hence was not subject to appeal.[4] The Applicant disagreed maintaining that the EAB did have jurisdiction and the Variation of Approval was subject to appeal as action taken by the Director "...upon his own opinion and initiative", within the meaning of s.67(3) of the Act.[5]

Following a consideration of written argument submitted by the parties, the EAB determined that it did not have jurisdiction to hear the appeal as: (1) the Board's jurisdiction depended entirely upon authorizing legislation - in this case EPEA and (2) the action taken by the Director was not action pursuant to any statutory provision for which an appeal to the EAB was provided.[6] Rather than exercising any of his own discretion under s.67, the Board found that the Director acted through delegated authority from the Minister to implement the recommendations of the EAB report, an action for which there was no statutory right of appeal. In rendering its decision, Dr. Tilleman, writing for the Board, noted that this did not leave the Appellant without a remedy; an application for judicial review of the Variation of Approval was an option that had, in fact, already been started. Dr. Tilleman concluded that:[7]

> ...there is no plenary right of appeal from all decisions of the Director. In particular, the Act is not designed to allow a new appeal to the Board from a variation of an approval due to a Ministerial Order.

Variation Quashed With Costs

Upon judicial review of the decision of the Director to issue the Variation of Approval, the Court found that by failing to adhere to the recommendations of the EAB as approved by the Minister, the Director had acted without jurisdiction and hence the Variation of Approval was of no force or effect.[8] Specifically, the Director: [9]

- made a decision he did not have the authority to make by allowing discharge into the creek, notwithstanding the recommendations of the EAB;
- failed to take into account relevant considerations, i.e. the recommendations of the EAB and Mr. Stelter's common law rights as an affected property owner, and
- took irrelevant considerations into account in the form of Ministerial advice and the Director's own interpretation of Departmental policy.

Accordingly, the Court quashed the Variation of Amendment and ordered the Director to vary the Approval to remove the option of discharging effluent into the creek.[10]

Although the Court declined to find the Director in contempt of court, as applied for by the Applicant, Mr. Justice Dea did order costs on a solicitor - client basis noting that while the Director had not been trying to "...drive the applicant into the ground...[he]...certainly did not try very hard..." to take the spirit or intent of the EAB recommendations into account.[11]

Comment

If the intent of the Legislature was to limit review of

(Continued on Page 9)

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(Courts Consider Polluter Profits in Sentencing ... continued from page 3)

with this type of economic crime namely, to first take away the profit associated with the illegal activity, and secondly to look at a criminal penalty as an economic deterrent to others. The recommended approach was to double the value of the theft. The Crown recommended a total penalty of $178,000, which was twice the value of the timber and reforestation cost ($252,000) minus the amount of the overpayment received from the mill ($74,000).

The court accepted the Crown's recommendation to emphasize deterrence by doubling the cost of the value of the timber and cost of reforestation. However, it found that there were exceptional circumstances in this specific case. These included:

- the accused was a small company made up of basically family members which would be greatly impacted by this penalty,
- there had been a guilty plea,
- the matter had been before the court for a long time because of factors beyond anyone's control and
- during the delay, the accused did not do any business in Alberta and had reduced business in B.C.

As a result of these exceptional circumstances the Court imposed a fine of $150,000 against which the $74,000 overpayment would be applied leaving a balance of $76,000.

1. (4 February 1997) Edmonton 9509-0121 (Alta. Q.B.).
2. (9 February 1999) Wainwright 80508930P10101, (Alta. Prov. Ct.)
3. (28 April 1999) St. Paul 9730-0026-C5 (Alta. Q.B.)

(Court Sets Aside Director's Decision Varying Approval ... continued from page 8)

environmental decision making to appeals to the Environmental Appeal Board, it appears that the restriction is only partly successful. Firstly, as noted by the EAB itself, AEPA does not provide the right of appeal from a variation of an approval pursuant to a Ministerial Order. The absence of a statutory right of appeal leaves the remedy of judicial review intact. Secondly, notwithstanding the privative clause provided by the Act, decisions made in excess of jurisdiction are subject to and may be set aside through judicial review.

■ **Elizabeth Swanson**
Senior Regulatory Counsel - Environment
Transmission Law, TransCanada Pipelines

1. S.A. 1992, c.E-13.3.
2. As referred to in *Stelter* v. *Director of Air and Water Approvals*, (22 April 1999) Edmonton 9903-010515 (Alta. Q.B.) at 5.
3. *Ibid.* at 7.
4. *Stelter* v. *Director, Environmental Sciences Division, Alberta Environmental Protection* (9 February 1999) #98-243D (EAB), at 1-2.
5. *Ibid.* at 4.
6. *Supra*, note 4 at 4-7.
7. *Supra*, note 4 at 8.
8. *Supra*, note 2 at 9
9. *Ibid.*
10. *Supra*, note 2 at 10.
11. *Supra*, note 2 at 14.

(The *Multilateral Agreement on Investment* and the Environment ... continued from page 2)

investment, countries are imposing fewer and fewer performance obligations upon investors. This means that the MAI environmental exceptions will be of limited and declining use.

In any event, if the MAI environmental exception to the performance obligations provision is interpreted similarly to the GATT environmental exceptions it may provide only rare justification for a state's domestic content performance obligations in order to protect the environment. The GATT/WTO jurisprudence shows that it is arguable that countries will be required to show that their legislation was the least investment restrictive option, and that the legislation is specifically in accordance with international standards. Countries will almost certainly be required to conduct extensive international negotiations before they legislate to protect any part of the environment out of their jurisdiction, regardless of the likely effectiveness of such negotiations or the imminent danger to the environment.

Other Provisions

a) Investor-State Dispute Resolution

The investor-state dispute resolution provisions in the MAI enable investors to sue national governments if an environmental law causes loss or damage to their investment, or has the effect of expropriating their investment. The dispute procedures will permit investors to bring a wide range of disputes. Most commentators believe that investors will have strong cases if they plead that their investments have been expropriated by an environmental law in addition to pleading general loss and damage. Several recent cases filed under *North American Free Trade Agreement* (NAFTA) show how investors can use an investor-state dispute settlement regime to challenge states' environmental legislation.

b) Conflicting Provisions

The MAI contains some provisions which directly conflict with a state's ability to protect the environment. For example, countries are required to provide national treatment to investors. This means that a government must treat foreign investors no less favorably than they treat domestic investors. If a government imposes a regulation on investors it should not be more stringent upon foreign investors than on domestic investors. This could have implications for countries who have not comprehensively legislated with respect to their environment. For example, in the course of utilizing a new means of production a foreign investor may introduce new pollutants into a country. If that country attempts to regulate the pollution, the regulations will affect only the new investor. No domestic producers would be subject to the law. The foreign investor could therefore argue that the country has breached its national treatment obligations. The national treatment obligation arguably prevents states from imposing environmental laws which coincidentally affect only foreign investors.

Conclusion

The MAI as currently drafted will not allow countries to pursue sustainable development. It contains little scope for countries to justify their environmental measures, and countries will be exposed to being challenged by foreign investors when they pass an environmental law which affects foreign investors. The MAI should be re-drafted before countries who want to pursue sustainable development consider signing it.

■ **Lee McIntosh**
LLM Student, University of Calgary
Mallesons Stephen Jacques
Perth, Western Australia

Practical Stuff

By Ron Kruhlak, *McLennan Ross*

Contaminated Land: When should we tell?

As buyers and sellers now recognize the many environmental risks associated with real estate transactions, they are regularly obtaining environmental site assessment reports. When a party learns of contamination on the lands, they are sometimes faced with the dilemma of whether they should report the findings to the authorities. You may have to report the release when you are the owner, when you have control of the contaminating substance, or when you simply become aware of the problem. You must consider your obligations under a number of different pieces of legislation.

Pursuant to the Alberta *Environmental Protection and Enhancement Act*, the person who causes or permits the release, or the person having control of the released substance, is responsible for determining whether there was an adverse effect and for reporting the release. There are specific provisions in the Act and pursuant to the *Release Reporting Regulations*, (A.R.117/93 as amended). In 1995 the Department issued a guideline entitled the "Release Reporting Guideline" to clarify how Alberta Environment will interpret the Act and Regulations and provide clarification on reporting obligations. It is rather easy to determine whether to report if you know the exact quantity of the substance that was released because you can turn to the table and determine whether the quantity exceeds that specified as requiring notification. The gray area is when you are unable to determine the quantity and have to make a determination whether the release of the substance to the environment has caused, is causing, or may cause an adverse effect. This basically requires one to conduct an informal risk assessment. For guidance, one can turn to the draft *Remediation Guidelines for Petroleum Storage Tank Sites* (1994) which addresses many issues such as the impact on groundwater, whether contamination has migrated off-site, the use of the property, and risk to public health. After considering these factors, if there is any doubt, or if there is difficulty in determining whether there may be an adverse effect, one should report the release. It is clear that a strict reading of the legislation requires any release to be reported. However, when you are exercising judgment, it should be reasonable and one should err on the side of reporting.

Operators in the oil and gas industry should also consider the Alberta Energy and Utilities Board ("EUB") Information Letter 98-1 which provides a Memorandum of Understanding between Alberta Environment and the EUB for release notification requirements for the upstream oil and gas industry. Again, the EUB requires the reporting of any release in excess of 2 cubic meters of product on-lease, or any release off-lease, any release from a pipeline, and any release on or off-lease which may cause an adverse effect.

A landowner may also have an obligation under the *Safety Codes Act* to report an unsafe condition. The owner, if required by the regulations, shall forthwith report it to an administrator, or to the accredited municipality if the thing, process or activity is under the administration of the accredited municipality (section 55). The *Safety Codes Act* deals with various specific circumstances, and it is necessary to consult the various regulations to determine if you have any obligations under this Act.

Finally, additional specific notification directions are contained in the *Alberta Fire Code*. In the event of a loss of a flammable or combustible liquid caused by a spill or leak, the owner must ensure that an inspector or local assistant is notified if the quantity spilled or leaked exceeds 100 litres or is sufficient to cause a sheen on nearby surface water (section 4.1.9.1(4)(a),(b)). There is also a reporting requirement that requires a person to forthwith report to an inspector or local assistant if he has information about a leak of a flammable liquid or combustible liquid that:

a) is based on an analysis or other evidence of flammable liquid or combustible liquid in a monitoring well or a water well, or
b) indicated the presence of free or dissolved flammable liquid or combustible liquid in soil, groundwater, surface water, sewer lines, utility lines, water supply lines, basements, crawl spaces or on the ground surface. (part 4.3.17.2(2))

It is important to note that certain obligations under the Fire Code extend not only to the owner of the lands but also to anyone who learns of the information. This definition could include a potential purchaser who conducts a site assessment, learns of a problem, and decides not to proceed with the sale.

You can contact the Alberta Safety Codes Council at (403) 427-8523 to obtain a list of accredited agencies who need to be advised pursuant to the *Safety Codes Act* and the Alberta Fire Code, depending on where the property is located in Alberta, and to obtain further information about the reporting requirements. The EUB information Letter 98-1, as well as further information regarding the EUB or Alberta Environment requirements generally, is available by contacting the EUB's Field Surveillance Group at (403) 297-8132, Alberta Environment at (780) 427-6225, and Alberta Environment's Regulatory Approvals Centre at (780) 427-6311.

Generally it is in a party's best interest to ensure there is timely and reasonable disclosure of any contamination. Seldom are contamination issues smaller than initially identified and a conservative approach should be adopted when you are considering whether or not to report a release.

Ask Staff Counsel

Banks Say: You're Clean? Show Us the Certificate!

Dear Staff Counsel:
I am a real estate agent listing a service station for sale. My client advises me that the old underground storage tanks were previously removed and replaced with upgraded tanks and that any necessary environmental work has been done on the site. We have found that the banks ask for certification to be attached to their environmental questionnaires, but haven't been able to find any kind of certificate yet. Is there anywhere that my client and I can get a certification that this property complies with applicable environmental standards?

Yours truly,
C. King Abyer

Dear C. King:
Unfortunately for you and your client, currently there is no form of certificate issued in Alberta by government or any other agency or organization certifying or confirming the environmental condition of property. However, there are other options that you may want to consider pursuing.

There are searches that can be done to assess whether regulatory action has been taken with respect to certain properties or persons. Some information sources are listed below, but this is not a complete listing of all the types or sources of environmental enforcement or compliance information that may be available. None of these information sources will certify the environmental condition of a particular property.

Municipalities may provide information on orders that they have issued related to violations of their bylaws or environmental protection orders that they have issued under the *Environmental Protection and Enhancement Act* to clean up unsightly property. The local fire marshall, fire prevention bureau/branch or fire department may provide information about fire prevention orders that they have issued under the *Fire Code* regulations. The method of accessing this information will vary from municipality to municipality.

The Petroleum Tank Management Association of Alberta maintains an inventory of petroleum tank locations in Alberta and a partial inventory of abandoned tank locations. Your written request should state the legal or municipal address of property, and the name of the person or company to whom the information sought relates, and should be provided to the Association, 1560, 10303 Jasper Avenue, Edmonton, AB, T5T 3V6, phone (780) 425-8265, fax (780) 425-4722.

The Alberta Safety Codes Council can provide information on orders that require action for compliance with safety codes. Your written request should state the name of the person or company to whom the information sought relates, and should be sent to the Chief Administrative Officer, Alberta Safety Codes Council, 602, 10808 – 99 Avenue, Edmonton, AB, T5K 0G5, phone (780) 427-8523.

Alberta Environmental Protection provides notification referred to as a letter of completion or compliance when site decommissioning is complete. Provide a legal description of the property to Alberta Environmental Protection, Contaminated Sites & Decommissioning Branch, 5th floor, 9820 – 106 Street, Edmonton, AB, T5K 2J6, phone (780) 427-9628.

The Environmental Law Centre carries out searches of selected provincial government databases under contract to the Alberta government. The Environmental Enforcement Historical Search Service provides information on enforcement action taken under the *Environmental Protection and Enhancement Act* and previous legislation in response to written requests providing the name of a person or company. The Wellsite Reclamation Historical Search Service provides information on reclamation certificates, orders, and conservation and reclamation notices for private lands in response to written requests providing a legal land description or the name of a person or company. Either search service can be contacted at the Environmental Law Centre, 204, 10709 Jasper Avenue, Edmonton, AB, T5J 3N3, phone (780) 424-5099, fax (780) 424-5133.

You should be aware that section 105.1 of the *Environmental Protection and Enhancement Act* provides for the issuance of remediation certificates for land that has been remediated under the Act, the directions of an inspector or Director, or the requirements of an environmental protection order or approval. However, the details related to remediation must be set out in regulations made under the Act. To date, these regulations have not been enacted, although Alberta Environmental Protection has been working on such regulations.

Your client could consider providing copies of any documents supporting or confirming the property's environmental condition to the banks and to any potential buyers. However, he should check first to ensure he is not restricted by contracts with the environmental consultants or other agreements from releasing such information to third parties.

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@elc.ab.ca. 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

Alberta Law Foundation