News Brief
ENVIRONMENTAL LAW CENTRE

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204, 10709 Jasper Avenue
Edmonton, Alberta T5J 3N3

In This Issue

Environmental Orders and Actions Affecting Real Estate: Practitioners Be Warned

Fraser Park South Estates Ltd. v. *Lang Michener Lawrence & Shaw* (1999) Vancouver C918006 (BCSC)

Introduction

A decision of the British Columbia Supreme Court earlier this year should interest legal practitioners who deal with commercial and real estate transactions. In this case, a Vancouver solicitor was held to have breached his duty of care to his clients by failing to alert them to an environmental abatement order applying to property they were purchasing.

The Facts

The Plaintiffs retained the Defendant solicitor to act on their behalf in the purchase of unsubdivided land for development as a residential housing complex. At all relevant times, there was hogfuel buried on the property which caused leaching of contaminants. All parties were aware of this situation. After the transaction closed, but before subdivision approval was granted, the provincial Ministry of Environment advised the Plaintiffs of an outstanding pollution abatement order that had been issued under the B.C. *Waste Management Act*[1] dealing with the removal of the hogfuel leachate. The Plaintiffs sued the Defendant solicitor in negligence. The Plaintiff claimed damages in excess of two million dollars for the costs of leachate control and carrying charges incurred when the subdivision approval was delayed.

The Findings

The Court held that the Defendant had breached the standard of care owed by a reasonable solicitor to its client. Factors that the Court considered relevant in finding a breach included:

- The Defendant claimed expertise in complex transactions involving commercial real estate purchase and development, and should have thus recognized the environmental concerns and sought assistance from a lawyer with environmental expertise;
- The Defendant was aware of the applicable environmental legislation and the potential liability of property owners for non-compliance;
- The Defendant's firm had in its library a recent manual on avoiding environmental liability, which highlighted purchasers' concerns;
- The Defendant's firm had issued an alert on environmental liability to its clients;
- During the course of the transaction in question, the Defendant's firm was developing environmental clauses to be added to their standard precedents;

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EDITOR
Arlene Kwasniak

ASSISTANT EDITORS
Cindy Chiasson
Andrew Hudson

PRODUCTION EDITOR
Debbie Lindskoog

ADVISORY COMMITTEE
Ron Kruhlak,
McLennan Ross
Keith Ferguson,
Cruickshank Karvellas
Andrea Moen,
Milner Fenerty
Marta Sherk,
City of Edmonton
Law Department

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Organizations: $30 + GST

204, 10709 Jasper Avenue
Edmonton, Alberta
Canada T5J 3N3

Phone: (780) 424-5099
Fax: (780) 424-5133
E-mail: elc@elc.ab.ca
http://www.elc.ab.ca

The Staff of the
Environmental
Law Centre
extend their
best wishes for a happy
holiday season
and a memorable beginning
to the Millennium
New Year

- At the outset of negotiations in this transaction, the Defendant had seen a preliminary municipal subdivision approval that suggested contacting the provincial Ministry of Environment regarding the leachate problem. The Defendant also admitted that the Plaintiffs were relying on him to conduct due diligence on their behalf.

While the Court found that the Defendant had breached his duty of care as a solicitor, the Plaintiffs' case ultimately failed due to lack of evidence of causation. The Court found that there was sufficient evidence that the Plaintiffs would have proceeded with the transaction regardless of the existence of the pollution abatement order.

Alberta Applicability?

In spite of the lack of causation, this case raises a red flag for lawyers with commercial and real estate practices. We are unaware of any similar case in Alberta. However, based on the reasoning in this decision, an Alberta court could find a duty of care on solicitors in real estate or commercial transactions to conduct relevant environmental searches and report the results to their clients in a timely fashion.

Potential Searches

There are standard searches that can be done by Alberta practitioners as part of due diligence for environmental concerns. Since April 30, 1998, section 210.1 of the *Environmental Protection and Enhancement Act* [2](EPEA) has enabled the registration of enforcement orders, environmental protection orders and designations of contaminated sites under that Act on certificates of title. It is important to note, however, that a Director of Alberta Environment is not obliged to register any of these documents against title; such an action is discretionary on the part of the Director. [3] As such, a title search that does not reveal any of these documents is not necessarily conclusive.

Alberta Environment maintains databases containing information about enforcement action taken under EPEA and predecessor legislation, including orders, prosecutions and administrative penalties, and information about reclamation certificates issued on private land. The search services for these databases are operated by the Environmental Law Centre under contract to Alberta Environment. Further information and fee structure for searches are available from the Environmental Law Centre and are posted on the Environmental Law Centre website.[4]

The Alberta Energy and Utilities Board (EUB) provides a Land Development Information Package upon request for those planning land subdivision or development or purchasing land for those purposes[5]. Each package will provide information on oil and gas related facilities and coal mines in the vicinity of the area identified to the EUB by the person requesting the information. Previous editions of *News Brief* have provided lists of potential sources of environmental information[6]. As well, Environmental Law Centre staff counsel are able to answer questions and provide information and guidance to practitioners dealing with environmental concerns.

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

1. R.S.B.C. 1996, c.482.
2. S.A. 1992, c. E-13.3.
3. Section 210.1(2) EPEA.
4. See www.elc.ab.ca/services/search2.html (Environmental Enforcement Historical Search Service) and www.elc.ab.ca/services/wellsite.htm (Wellsite Reclamation Historical Search Service).
5. Alberta Energy and Utilities Board, *General Bulletin GB 99-4* (12 March 1999). GB 99-4 is accessible on the Internet at www.eub.gov.ab.ca.
6. See *News Brief*, Vol. 14, No. 2 at 12, and *News Brief*, Vol. 10, No. 2 at 12.

Enforcement Briefs

By Jillian Flett, *Alberta Environment*

First Enforcement Order Issued Under Alberta's New *Water Act*

On September 10, 1999, the first enforcement order was issued under Alberta's new *Water Act*[1]. The order to Valiant R.V. Park Inc. required the removal of a water well and pump house that had been constructed on the bank of the Sheep River. The order also required the removal of fill material located on the riverbank and the restoration of the riverbank.

The fill material had been placed on the river bank at the Valiant R.V. Park site without the necessary approvals (contrary to s.36 of the *Water Act*). Based on the volume and location of the fill material, there was a concern that the structure holding the fill would collapse and the fill would enter the Sheep River and cause siltation.

A shallow well had been installed in the gravel beside the Sheep River to withdraw surface water from the river without the necessary approval (contrary to s.36 of the *Water Act*). Because of the high demand for water from the Sheep River, a moratorium has been in place since 1985, prohibiting new water diversion from the river. Therefore, no new approvals were being issued for this type of activity.

Under the *Water Act,* the director may issue an enforcement order when she/he believes there has been a contravention. Pursuant to s.136, an enforcement order may require that certain steps be taken to come into compliance with the Act. These include:

- removing the works placed without an approval,
- restoring or reclaiming an area affected to a condition satisfactory to the director,
- repairing works in order to protect human health, property or public safety,
- suspending or canceling an approval, license or registration,
- stopping an activity, diversion or operation of a works that has no approval, or
- taking any action the director considers necessary to facilitate compliance with the Act.

It is an offence not to comply with an enforcement order.

The Valiant order (as amended on October 27,1999) required that the unauthorized well be immediately removed and reclaimed by November 30,1999. It also required a plan outlining how and when the fill material would be removed and the riverbank restored. This work was to be completed by November 30,1999. The company was required to report weekly on its progress and provide written confirmation within 5 days of the work being completed.

The Valiant order emphasizes the need for water users to obtain an authority to use water, especially in situations where there is a limited amount of available water. It also emphasizes the importance of the approval requirements restricting activities along the riverbank as a way to protect the aquatic environment by preventing erosion and siltation.

The *Water Act* also provides for water management orders to prevent problems that could cause an adverse effect to the environment, public health or safety. These proactive orders are in addition to the more reactive enforcement orders that are triggered by a contravention of the Act (which may be after the damage has occurred).

Pursuant to s.97, water management orders can be issued for many circumstances including:

- if the director is of the opinion that a household user, approval holder or licensee has a diversion that may cause an significant adverse effect on the aquatic environment, human health, property or public safety,
- if the director is of the opinion that a temporary diversion should be suspended or if a flood may occur, or
- for the purpose of administering priority under the Act.

The approval requirements and the remedial orders available under the *Water Act* are important tools to ensure proper allocation of water and protect our valuable water resources.

[1] S.A. 1996, c. W-3.5.

Water Law Backgrounder

by *ELC Staff Counsel*

Water appropriation rights in Alberta are regulated under the *Water Act*. This fairly recent statute replaced the *Water Resources Act*, which, together with its similar predecessor, the *Northwest Irrigation Act* governed water rights in what is now Alberta since 1894. In many ways, the *Water Act* modernized water rights regulation. Significant among them was the Act's expanding and updating enforcement mechanisms. Unlike the scant enforcement provisions in the *Water Resources Act*, the *Water Act* contains an array of provisions, modeled on the enforcement provisions of the *Environmental Protection and Enhancement Act*.

In Progress

In the Legislature...

Federal Legislation

Bill C-32, the *Canadian Environmental Protection Act* received Royal Assent September 14, 1999. It will come into force when it is proclaimed early in 2000. A majority of the Standing Senate Committee on Energy, the Environment and Natural Resources recommended that a review of the legislation commence once it is passed rather than waiting for the required five-year review.

Federal Regulations

The Minister of the Environment has published a list identifying companies, alternative limits, and the time period that the limits apply re the reduction of benzene in gasoline. This is further to the *Regulations Amending the Benzene in Gasoline Regulations* that permitted companies unable to meet the July 1, 1999 implementation date for the reduction of benzene in gasoline to set a temporary alternative limit. (*Canada Gazette Part I*, September 4, 1999, pp. 2500-2503.)

The Department of the Environment has issued a *Notice to Anyone Engaged in the Production, Import or Use of Ozone-depleting Substances (ODSs)*. The Notice describes the process and time frame the Department will use in considering exemptions for essential uses of ODSs as agreed to under the Montreal Protocol. The exemptions, for 2001 and beyond, allow for the production or importation of new ODSs after their respective phase-out dates for those substances considered "essential". A decision of the Fourth Meeting of the Parties to the Montreal Protocol agreed to allow possible exemptions.

Alberta Regulations

Three Regulations were filed in August 1999 pertaining to the *Electric Utilities Act*. These are the:

- *Balancing Pool Regulation* (AR 169/99),
- *Direct Sales Regulation* (AR 180/99), and the
- *Power Purchase Arrangements Regulation* (AR 170/99).

(*The Alberta Gazette Part II*, September 15, 1999, pp. 728-736, 736-740, 784-788.)

The *Water (Ministerial) Regulation*, AR 205/98 has been amended by AR 200/99 as of September 3, 1999. The amendment specifies the only bridge crossing included in the definition of "crossing" to be a single span bridge. The amendment further amends Schedule 2, *Activities Within Designated Areas of the Province for Which an Approval is Not Required*, by defining what "crossing" includes and specifying circumstances where an approval is not required re a crossing in a water body in the Green Area. (*The Alberta Gazette Part II*, September 30, 1999, p. 898.)

Cases and Enforcement Action...

The Federal Court of Canada, Trial Division has released its Reasons for Order in *Rocky Mountain Ecosystem Coalition* v. *Canada (National Energy Board)*. The reasons arise out of motions to strike out two applications for judicial review filed by the Coalition re the Alliance Pipeline Project. The first application sought an order setting aside the decision of the Board regarding the Project while the second, sought relief in the nature of mandamus requiring the Department of fisheries and Oceans and the Prairie Farm Rehabilitation Administration to conduct a panel review of the Project. Both applications were struck out.

Alberta Court of Queen's Bench Justice Medhurst denied an application to have environmentalist Dave Jensen ruled in contempt for not providing adequate information in the court action launched against the Municipal District of Clearwater and Richardson Brothers Ltd. engineering firm. Jensen laid the citizen's charge under the federal *Fisheries Act* in August 1997. The case is scheduled to go to trial November 17, 1999 in Rocky Mountain House Provincial Court.

In a decision September 13, 1999, an Alberta Provincial Court Judge in Hinton assessed a fine of $15,000 to a man following a guilty plea to poaching a bighorn sheep in Jasper National Park. The man also pleaded guilty to unlawful possession of wildlife under the provincial *Wildlife Act* and was assessed a further $100 fine, lost his hunting licence for two years, and forfeited his rifle.

A Federal Court of Appeal decision upheld the July 1998 ruling striking down the federal permit allowing a logging bridge built by Sunpine Forest Products over the Ram River near Rocky Mountain House. The ruling requires a new federal environmental assessment that will consider the cumulative impacts of the project. (See *The Regulatory Review*, July 1998, IV.9 and *News Brief*, Vol.13, No.3, p.7.)

A Federal Court decision by Justice Rouleau has ruled the Parks Canada decision to approve the convention centre at Lake Louise complies with the *Canadian Environmental Assessment Act*. Two environmental groups had applied for judicial review of the decision in July 1998 and were represented by the Sierra Legal Defence Fund. The groups were concerned that all components of the convention centre, along with the overall impact the development would have on Banff National Park when combined with other plans for the area were not considered. The groups are considering an appeal.

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

Canadian Environmental Protection Act Review - A Saga of Strife

The 1988 *Canadian Environmental Protection Act* (CEPA) is the major federal statute capable of regulating the worst toxic pollutants in Canada. CEPA requires Parliamentary review within 5 years of enactment. In June of 1994, the House of Commons referred the review to the Standing Committee on Environment and Sustainable Development. The five years since have been characterised by highly charged tension among champions of health, environment, labour and other public interests, the government, and the regulated chemical and other affected industries.

In its review, the House of Commons Standing Committee criss-crossed the country, heard hundreds of witnesses and read written submissions from the ambit of stakeholders, including representatives from industry, environment, health, labour, governments and academia. After these processes, in 1995, the Committee produced its report titled *Its About Our Health! Towards Pollution Prevention*. This visionary 365 page document containing 141 recommendations called for a thorough revamping of CEPA to facilitate and compel a more ambitious federal agenda for environmental and health protection. Among recommendations, the Committee urged caution in harmonization, strong citizen suit provisions, phase out of persistent, organic pollutants ("POP's"), mandatory pollution prevention planning, a strong, aggressive federal role in environmental protection and meaningful application of the precautionary principle. Of particular note, the Committee recommended that CEPA's assessment process for toxicity specifically allow for hazard assessment for inherent toxicity as an alternative to CEPA's current risk assessment.[1]

The federal government issued its formal response to the Committee's report in December of 1995. The response report titled *Environmental Protection Legislation Designed for the Future – A Renewed CEPA,* rejected many of the Committee's key recommendations. For example, it declined to support hazard assessment, supported harmonization, and advised that CEPA require only "virtual elimination" of POP's -- a measure falling short of actual phase out.

In December 1996, Government introduced the first CEPA renewal bill, Bill C-74. On key public interest and federal leadership matters, this Bill reflected Government response to the House Committee Report. It retained solely risk assessment for determining CEPA toxicity; contained weak, and arguably illusory citizen action suit provisions; authorized, but did not require pollution prevention planning; addressed only virtual elimination of POPs as set by emission limits in regulation and not actual phase out; supported vigorous harmonization instead of an aggressive federal role and included a statement of the precautionary principle that permitted only *cost effective* steps to be taken in the absence of scientific uncertainty. Bill C-74 died on the order paper with the dissolution of the House for the June, 1997 federal election.

The House of Commons reintroduced a revised CEPA in March 1998 as Bill C-32. Bill C-32 carried over Bill C-74's reflection of the government response on the mentioned public interest and federal leadership matters. Second reading and debate ensued and in April 1998, the Bill was referred to the Standing Committee on Environment and Sustainable Development.

The Committee review took place over 11 months. It accepted submissions and heard witnesses from every relevant sector.[2] Following clause by clause review it made 157 amendments. Although many of these were of a technical nature, some were substantive and from environmental and health advocates prospective, strengthened the Bill. These included allowing some room for government action on the basis of inherent toxicity; altering the definition of "virtual elimination" and changing text so that a risk based assessment is not always needed for a substance to be put on the track for virtual elimination; weakening the harmonization requirements and removing the words "cost effective" from one occurrence of the precautionary principle. The Committee reported to the House on April 15, 1999.

The Environment Minister and other Liberal members then tabled amendments to the Bill. Some, in effect, changed Committee amended text back to the original C-32 provisions. These included re-inserting the words "cost effective" in the precautionary principle and changes so that a risk based analysis for toxicity be required for substances on a virtual elimination track. The House passed the amendments though three Liberal members of the Committee that reviewed the Bill voted against them. The Bill was then introduced in the Senate for first reading.

The Senate Standing Committee on Energy, the Environment and Natural Resources scheduled public hearings. Once again interested stakeholders had opportunity to present their views, but this time to a new audience, for the proverbial sober second look. The Environmental Law Centre appeared before the Senate Committee on August 31, 1999. Although consistent with Senate's usual practice, the Committee did not amend the Bill, it clearly was moved by its tension-laden history. A majority of them recommended that a review of the legislation commence once it is passed rather than waiting for the required five-year review. Proclamation is planned for early 2000.

■ **Arlene J. Kwasniak**
Executive Director
Environmental Law Centre

1. With hazard assessment, the intrinsic or inherent toxicity of substances may be sufficient for CEPA control measures. With risk assessment, CEPA toxicity cannot be found without first determining and quantifying what amount of a substance would constitute harmful exposure. Public interest representatives argue that because of the exposure requirement, risk assessment alone will not facilitate federal regulation of a host of substances or combinations of substances that are obviously toxic. Industry advocates, on the other hand, argue against CEPA's allowing for hazard assessment.
2. Both Environmental Law Centre briefs mentioned in this article may be accessed through the ELC homepage at www.elc.ab.ca

Case Notes

Oil and Gas Well Operator Liable for Damage to Livestock

Jones v. *Mobil Canada Ltd.* (1999), Calgary 9001-10902 (AB.Q.B.)

Introduction

This Alberta Court of Queen's Bench decision should attract attention from livestock producers and from the oil and gas industry. The case provides a useful example of the kind and degree of evidence required to enable a Court to address issues of negligence and nuisance in relation to oil and gas operations which impact agricultural activities such as livestock production. It sets forth and analyzes the elements necessary to prove a claim in negligence or in nuisance and makes important statements on standard of care for the oil and gas industry in the circumstances.

The Nature of the Claim and Issues Addressed

The claim against Mobil raised causes of action in both negligence and nuisance. To succeed in negligence Mr. Jones had to establish that Mobil owed him a duty of care, that the duty was breached by failing to meet a standard of care, and that damages had occurred as a result of that breach of duty. In order to establish the alternative claim of nuisance, Mr. Jones had to prove that Mobil wrongfully interfered with his use of property by virtue of contamination resulting from Mobil's use of the lands. In this regard, the Court discussed concepts of liability for nuisance, including the concept of strict liability for nuisance, under the doctrine known as the Rule in *Rylands* v. *Fletcher*[1].

If the Court found either breach of duty of care or nuisance, it would then address whether Mr. Jones had proven a causative link between the actions of Mobil and the health problems of his cattle herd. If a causative link could be shown, the Court would then move on to address the appropriate level and determination of damages.

The Evidence

The Court spent a great deal of time reviewing the Plaintiff's evidence in relation to his livestock operations including the chronology of health problems of his cattle herd. It considered details of other oil and gas and ranching operations in the area as well as other possible causes for the health problems experienced by the cattle herd. Of note was that Mr. Jones had kept very detailed records of his cattle operation and had considerable data on birth dates and weights on individual animals from 1980 onwards. For example, he had detailed records on the animals he alleged had been exposed to contaminants. The records provided individual histories for the exposed animals including graphs comparing their weight gain to weight gain of animals not exposed to contaminants and described reproductive problems attributed to exposure to oil and gas contaminants. As well, Mr. Jones provided evidence on the specific sites where contamination was alleged to have occurred, the history of complaints to Mobil, and on how the complaints were handled. Also in evidence were tests conducted by Mobil as well as by departments of Alberta Environment. A considerable amount of testimony from both Mobil's and Mr. Jones' witnesses concerned matters such as the toxicity to livestock of materials used in oil and gas operations, issues of soils management and chemical deficiencies alleged in relation to the cattle herd as well as evidence relating to the virus diarrhoea (BVD) alleged to be a possible cause of the herd's health problems. The Court closely reviewed each item of evidence.

The Court's Analysis

Establishing Negligence and Nuisance

The Court first dealt with the claim in negligence. Mobil had conceded that as an operator of oil and gas wells on Mr. Jones' property and property that he was leasing, it owed a duty of care to Mr. Jones. Consequently, the first issue to be determined was the appropriate standard of care to be applied to Mobil. The Court found that Mobil's knowledge of the harmful effects of oil and gas contaminants on livestock and the previous complaints from Mr. Jones raised the standard of care beyond general industry standards to impose a duty to effectively prevent access by cattle by providing effective fencing. Since Mobil had not erected effective fencing, it breached its duty of care.

By contrast, the Court found that Mobil through its predecessor, Canadian Superior, met the appropriate standard of care by burying a flare pit in accordance with the remediation practices of the industry at the relevant time. However, in dealing with the nuisance claim, the Court found that burying the flare pit had created a condition that led to nuisance. The Court determined that Mobil would bear strict liability for such nuisance. The Courts stated, applying reasoning from *Smith Brothers Excavating Windsor Ltd.* v. *Camion Equipment & Leasing Inc. (Trustee of)*[2], that:

> In nuisance, a Court must be satisfied that the Defendant has done all it reasonably could and all that was practicable to avoid the nuisance, even where, ... the special use the Defendant makes of the property benefits the community as a whole.

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Minister Rejects Recommendations of Environmental Appeal Board

Mizera et al v. Director, Northeast Boreal and Parkland Regions, #2, Alberta Environmental Protection, re: Beaver Regional Waste Management Services Commission (13 July 1999) 98-231 - 98-233-R (EAB)

If not for the interminable piercing sound of backup beepers from heavy trucks dumping garbage into the Beaver Regional Waste Management Services Commission landfill, whoops of joy could have been heard from the modest farm houses surrounding the landfill on the outskirts of the Village of Ryley. After years of fighting insouciant regulators, and an arduous appeal to the Environmental Appeal Board, it appeared that their concerns about the landfill and its effect on the environment and the use and enjoyment of their property were finally heeded.

The happiness of the landowners only lasted as long as it took to read the Board's 80-page report. Appended to the back of the report was the crushing Ministerial Order of Environment Minister Gary Mar which, in effect, rejected the Appeal Board's recommendations that the landowners' environmental and other concerns be addressed by a new application and a new decision be made by the Director. Considering that the Board found that the issuance of the Director's approval was contrary to the *Environmental Protection and Assessment Act*[1] ("EPEA") and, at very worst, an abuse of process, the Minister's decision to uphold the approval was surprising to them, if not shocking.

Several landowners, primarily small farmers who lived adjacent or near the landfill, appealed the Director's decision to allow this major expansion. After 3 days of hearings, which lasted into the wee hours of the morning, the Board issued a decision recommending that the appeals be allowed. The Board was unabashed in its condemnation of the Director's decision and the "bending of the rules" that was done for the benefit of the Commission. Concerns of the Board included the Director's failure to order an environmental impact assessment, the incompleteness and lack of information in the Commission's application for an approval and the Director's decision to approve the expanded landfill despite insufficient and conflicting information regarding the impacts of the expansion and despite significant concerns by the Director's technical staff. The Board concluded: "In fact the decision was at its very worst an abuse of process and at the very least a quantum leap backward in a standard to which Albertans have become accustomed to and demand."[2] The Board's recommendations included requiring the Commission to resubmit a complete and detailed application with a new review and decision to be made by the Director.

Under EPEA, the report and recommendations of the Board must be forwarded to the Minister of Environment who then may accept or reject the recommendations of the Board and make any decision that the Director could have made in the first instance. In this case, the Minister issued an order which neither addressed the Board's findings of illegality by virtue of failure to comply with EPEA's requirements, nor the Board's comments on abuse of process. Instead, the order varied the Director's decision by requiring that certain reports and plans be prepared by the Commission (previously requested by the Director) and submitted over the next two years. Essentially the only new requirement in the Minister's order was that the landowners must be given an opportunity to comment on these reports and plans and the Commission must hold a public meeting in the village of Ryley prior to the Director approving the plans.

This is not the first time that the Board's decision and recommendations have not been implemented. For example, in earlier proceedings, a Mr. Stelter successfully appealed a decision by the Director of Air and Water Approvals to permit the discharge of sewage effluent across his farmland[3]. Although the Minister ordered the Board's decision be implemented, the Director reissued an approval permitting the very discharge that the Board had found unreasonable. Mr. Stelter was forced to take the matter to the Court of Queen's Bench to obtain an order quashing the Director's decision[4]. Only then did the Director comply with the Board's recommendations.

These cases raise serious questions regarding the utility of the statutory right to appeal from a Director's decision. In many cases an application directly to the Court to review a decision by the Director may be a more efficacious remedy and in the long run, less costly than proceeding with a hearing before the Environmental Appeal Board prior to seeking relief from the Court. While a litigant should exhaust any available statutory appeals prior to seeking relief from the Court by way of judicial review, this principle is qualified. The statutory appeal process must be an adequate alternative remedy. The factors which the Court will use to assess the adequacy of the alternative remedy include effectiveness, expeditiousness and the costs of the other proceedings[5]. If the factors which may be taken into account are not closed, any relevant factor should be considered by the Court[6].

Because of the possibility that the Minister will render a decision contrary to the Board's recommendations without providing reasons for doing so or providing the parties with a right to respond to the considerations he based his decision upon, it is arguable that this statutory right of appeal is not adequate and judicial review is therefore a preferable remedy. While there is a privative clause in EPEA protecting decisions by the Board and Minister, there is no similar clause applicable to a decision by a Director. Thus the scope for judicial review directly from a Director's decision rather than from a Board or a Minister's decision is greater. One caveat applies, however. There are only limited circumstances in which new evidence can be brought forward in a judicial review proceeding. If the appellant(s) wish to rely upon new evidence that was not before the Director at the time of his decision, an appeal to the Environmental Appeal Board provides an opportunity for submitting the new evidence.

(Continued on Page 9)

Action Update

Wellsite Reclamation Review

In 1998, the Alberta government began a process to update the reclamation criteria for wellsites, which included stakeholder review and public consultation.[1] The multi-stakeholder Steering Group overseeing the process recently issued its final recommendations, which were accepted by the Ministers of Environment and Agriculture, Food and Rural Development.[1] The Ministers reiterated the commitment made by the previous Ministers that the current reclamation inquiry process for wellsites be retained and that an audit process for agricultural lands not be implemented at present.[1]

Given this position, the Steering Group had focused many of its final recommendations on improving the process through enhanced information flow to landowners and occupants. In this vein, recommendations included:

- requiring completion of pre-disturbance reports by operators, with a copy provided to the landowner or occupant;
- requiring operators to provide a copy of the reclamation certificate application to the landowner;
- providing the landowner with notice of wellsite abandonment prior to closure;
- making landowners aware of their options and opportunities to participate in the reclamation process and of their avenues for complaint and appeal.

Through the course of the consultation process, concerns were expressed that the current appeal process to the Environmental Appeal Board could be expensive and intimidating, especially for landowners. The Steering Group recommended that the Environmental Appeal Board be encouraged to emphasize mediation in appeals dealing with wellsite certification.

The Steering Group also made recommendations regarding soil and groundwater contamination, including a review of contamination assessment and remediation and comments on liability for wellsite contamination. The Ministers indicated that they supported a recommendation for a public review process in the near future to address concerns regarding contamination and remediation criteria.[1]

One point of concern is the recommendation dealing with liability for contamination. The recommendation states that "(c)ontamination liability goes to the government if the wellsite license holder cannot be found. The liability is not transferred to the landowner..."[1] This conflicts with the liability provisions found within the *Environmental Protection and Enhancement Act* (EPEA). Under Part 4 EPEA, landowners may face liability for remediation of designated contaminated sites, as persons responsible for a contaminated site.[1] As well, there are no provisions within EPEA which explicitly provide that the Province will assume liability for site contamination where a wellsite license holder cannot be found. This conflict raises the potential for confusion at the very least. Hopefully the Province will take steps to deal with the conflicting information and ensure that landowners affected by wellsite reclamation are not given erroneous information.

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

1. See *News Brief*, Vol.13, No.2, p.5 and Vol.13, No.3, p.9.
2. Ministers Mar and Lund, letter to stakeholders, October 27, 1999.
3. *News Brief*, Vol. 13, No.3, p.9.
4. *Supra* 2.
5. Wellsite Reclamation Criteria and Certification Process, Public Report of the Steering Group, October 1999, p.2, Recommendation 3.
6. Sections 96(1)(c) and 114 EPEA.

What's New on the ELC Website?

Go to the **"What's New?"** link at our website - **www.elc.ab.ca** - and check for the Environmental Law Centre comments on:

- Proposed *Municipal Government Act* Regulations on Assessment and Taxation
- Evaluation of the Environmental Appeal Board
- Response to Additional Public Consultation on the Proposed *Natural Heritage Act*
- *Municipal Government Act* Requested Amendments
- Submission to the Senate Standing Committee on Energy, the Environment and Natural Resources Regarding Bill C-32, the *Canadian Environmental Protection Act.*

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McLennan Ross
Mobil Resources Ltd.
Petro-Canada
Suncor Energy Foundation
Titan Foundry Ltd.
Weyerhaeuser Canada Ltd.

ASSOCIATES $500 - $999
AN-GEO Environmental Consultants Ltd.
Garry Appelt
Association of General Council of Alberta
Cheryl Bradley
Crestar Energy
Field Atkinson Perraton
Judith Hanebury
Ronald Kruhlak
Lucas Bowker & White
Mactaggart Third Fund
Sherritt International Corporation
Dennis Thomas, Q.C.
Donna Tingley
Zeidler Forest Industries Ltd.

FRIENDS $250 - $499
Ackroyd, Piasta, Roth & Day
Chevron Canada Resources
Paul Edwards
Keith Ferguson
Steve Ferner
Letha MacLachlan
Matrix Solutions Inc.
Al Schulz

CONTRIBUTORS $125 - $249
Ed Brushett
Thomas Dickson
J.W. Kozina Professional Corporation
Patricia Langan
McCuaig Desrochers
Ogilvie and Company
Dr. Mary Richardson
Wendell Samoil
Kim Sanderson

UP TO $125
Tammy Allsup
Brownlee Fryett
Carolyn Carlson
Gerald DeSorcy
Linda Duncan
David Duggan
Dr. Mary Griffiths
Brian R. Harris
Thomasine Irwin
Frank Liszczak
MacKimmie Matthews
W.G. Milne
Professor Ian Rounthwaite
Dr. Dixon Thompson

(Minister Rejects Recommendations . . . continued from page 7)

While the construction of the expanded landfills continues and beeping trucks continue to unload a mounting pile of garbage 13 hours a day, six days a week, the local landowners report there was some value to them of the statutory appeal process; their interests and the landfill's adverse impacts were finally acknowledged and recorded in a well reasoned and detailed decision by the Environmental Appeal Board.

■ **Karin Buss**
Ackroyd, Piasta, Roth & Day

1. S.A. 1992, c.13.3.
2. *Mizera et al* v. *Director, Northeast Boreal and Parkland Regions, #2, Alberta Environmental Protection, re: Beaver Regional Waste Management Services Commission* (13 July 1999) 98-231 - 98-233-R (EAB) at 78.
3. *Stelter* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection, re: GMB Property Rentals Ltd.* (22 May 1998) 97-051 (EAB).
4. *Stelter* v. *Alberta (Director of Air and Water Approvals, Alberta Environmental Protection)*, (22 April 1999) Edmonton 9903-01015 (Alta. Q.B.).
5. *Re Harelkin and University of Regina* (1979) 96 D.L.R. (3rd) 14 at 51 (S.C.C.).
6. *Matsqui Indian Band* v. *Canadian Pacific Ltd.* (1995) 122 D.L.R. (4th) 129 at 146 (S.C.C.).

Administrative Penalties

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

- $2,500. to the City of Airdrie and Melcor Developments Ltd. for constructing extensions to the wastewater collection and storm drainage systems without an approval or authorization contrary to their approval. This is in violation of s.213(e) of the *Environmental Protection and Enhancement Act.*
- $6,000. to Raylo Chemicals Inc. operating in Clover Bar for contravening their approval by failing to immediately report TSS exceedences, pH probe down-time and low chlorine levels on several occasions in September and October 1998. The company also failed to follow the prescribed procedures upon discovery of low chlorine levels. These are in violation of s.213(e) of the *Environmental Protection and Enhancement Act.*
- $4,500. to Valiant R.V. Park Inc. of Aldersyde for constructing and operating wastewater and waterworks systems at the park without the necessary approvals, contrary to s.59 of the *Environmental Protection and Enhancement Act.*
- $4,500. to NovaGas Canada Ltd. operating as TransCanada Midstream in Sturgeon County for failing to conduct weekly total flow monitoring (Oct. - Dec. 1998), monthly chloride monitoring (Aug. 1998 - April 1999), and failing to immediately report the missed monitoring contrary to their approval and in violation of s.213(e) of the *Environmental Protection and Enhancement Act.*

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

- $1,150. to 344260 Alberta Ltd. of High Prairie for contravening terms and conditions of their licence of occupation contrary to s.47.1 of the *Public Lands Act.*
- $2,185.20 to Canadian Natural Resources Limited of Calgary for unauthorized use of public land in violation of s.47(1) of the *Public Lands Act.*
- $1,212.75 to Leonary & Hugh Perra of Foremost for contravening terms and conditions of their grazing lease contrary to s.47.1 of the *Public Lands Act.*
- $1,428. to Walter Belcourt of Rainbow Lake for unauthorized use of public lands contrary to s.47(1) of the *Public Lands Act.*
- $600. to Anderson Exploration Ltd. of Calgary for contravening terms and conditions of their lease contrary to s.47.1 of the *Public Lands Act.*

(Oil and Gas Well Operator Liable for Damage to Livestock... continued from page 6)

...

> The natural resource industry is a steward of lands in Alberta together with the ranching and farming community, and for policy reasons should bear the burden of the highest standard of care where there is the possibility of injury arising from nuisance. In this case, I am not satisfied Canadian Superior met this standard of care in its disposal of the flare pit, even if its method of disposal was consistent with past industry practice.

Given the finding of nuisance, the Court found that it need not determine whether the rule in *Rylands* v. *Fletcher* should be applied.

Establishing Causation

In dealing with causation, the Court stated that Mr. Jones had to show, on a balance of probabilities, that the actions constituting the negligence or nuisance caused or materially contributed to the damage occasioned to his herd. After reviewing the expert evidence as well as the evidence provided by Mr. Jones, the Court was satisfied that it could reasonably be inferred that the chronic poor performance of the cattle herd was caused by, or materially contributed to by, exposure to an ingestion of oil and gas contaminants. It concluded this, despite evidence of selenium deficiency in the Jones' herd. The Court indicated that given the good state of the herd when the exposure to toxic substances had been removed (even though the animals remained selenium deficient), and given the well documented incidents of exposure to toxic substances, it was more likely than not that Mobil's negligence and its responsibility in nuisance caused the damage to the cattle herd.[3]

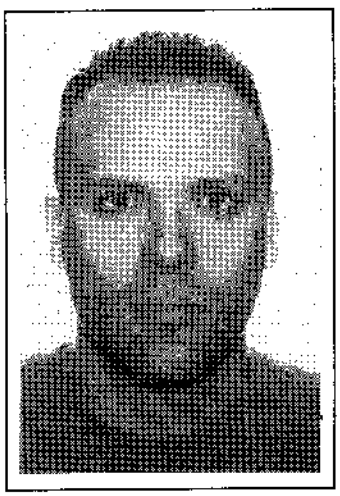
Precedent Value and Conclusions

This case has precedent value regarding the Court's determination of the type and degree of detail of evidence required to establish negligence and nuisance in relation to oil and gas operations impacting on ranching activities. Further, based on the Court's findings and comments, the case indicates that in claims of nuisance, a natural resource industry defendant will be expected to meet the *highest standard of care where there is the possibility of injury arising from such nuisance*. Essentially, the Defendant will be expected to satisfy the Court that it has done all it reasonably could and all that was practicable to avoid the nuisance.

■ **Charalee Graydon**
Blake, Cassels & Graydon

1. (1866, L.R. 1 Ex. 265, afford (1868), L.R. 3, 330 (H.L.). To succeed on this rule, the Plaintiff must prove that (a) the defendant, for his own purposes, kept or accumulated a substance likely to cause damage should it escape, (b) the substance was kept in a place occupied by the defendant, or kept in a place that the defendant controlled, (c) the substance escaped, and (d) damage or loss occurred as a natural consequence.
2. *Smith Brothers Excavating Windsor Ltd.* v. *Camion Equipment & Leasing Inc. (Trustee of)* (1994) 21 C.C.L.T. (2d) 113 (O.C.J. (G.C.)).
3. This case comment does not address matters of proof of damages and the precise calculation of such damages apart from saying that Mr. Jones had to prove his business losses and justify the method for calculating such losses.

1999 Mactaggart Essay Prize Winners



Brad Mandrusiak

The Environmental Law Centre is pleased to announce the winning essays for the 1999 Sir John A. Mactaggart Essay Prize in Environmental Law. The first prize was awarded to Brad Mandrusiak from the University of Alberta for his essay: *Playing With Fire - The Premature Release of Genetically Engineered Plants Into the Canadian Environment.* Second prizes were awarded to Andrew Bachelder of the University of Alberta for his essay: *Using Credit Trading to Reduce Greenhouse Gas Emissions in Canada,* and to Marshall Ogan of the University of Windsor for his essay: *An Evaluation of the Environmental Harmonization Initiative of the Canadian Council of Ministers of the Environment.*

Members of the 1999 volunteer selection committee were: Alastair Mactaggart (Honourary), Jennifer Klimek (Chair)*Barrister & Solicitor*, Ray Bodnarek *Alberta Justice,* Linda Duncan, and Robert Seidel, Q.C. *Lucas, Bowker & White* .

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 or see the Centre's website at www.elc.ab.ca/services/mactag2.html.

By Andrew R. Hudson, *Environmental Law Centre*

Troublemakers: Give Them What They Deserve

You run an operation that requires an approval from the Department of the Environment. Recently inspectors from the Department showed up at your plant. They reviewed particular parts of your operation and asked about specific records. They were looking for detailed information. You had the sense that they knew exactly what they wanted to see. Of course you cooperated with them. It was several weeks later, after much worry on your part, that they informed you that they found nothing that warranted any official action. You were greatly relieved.

You are certain that the inspection came about because of a complaint filed by one or more of your employees. You would like to know which ones and get rid of them for causing you all of this trouble.

You will not be able to find out from the Department of the Environment who it was that made the complaint. The *Freedom of Information and Protection of Privacy Act*[1] prevents the Department from disclosing the names of those who make complaints to the Department. Section 16(1) states "the head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy."

Section 16(4) goes on to state:

"A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if. . . (c) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation."

"Law enforcement" is broadly defined in section 1(1)(h). Only if your employee is called to testify will you find out about it.

If you do identify the employees responsible for the complaint there are some things that you should consider before firing them.

You probably feel that they have done this out of malice and that they are out to "get you." If you can prove this, dismissal may be justified. However there are other possible motives for the complaint.

Your employees have a personal stake in how you operate. At a basic level, they have an interest in the environment in which they work and raise their families. If they perceive that your operations are damaging that environment, they may be motivated to tell the authorities.

They may even have a more direct personal interest. The *Environmental Protection and Enhancement Act*[2] (EPEA), section 218 says:

"Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted for or convicted of the offence."

To the extent that your employees could be considered agents of your company, they face liability for corporate offenses that they assent to or participate in an activity which is an offence under the Act. If management fails to address specific problems they may feel that they have no choice but to complain.

You probably know that EPEA does not provide specific "whistle blower" protection. That does not mean however, that you are free to fire employees because they complain to regulators. There is protection for employees against being dismissed because of their complaints.
If your employees are unionized, this protection may be built into the collective agreement that governs their employment. In most cases these agreements allow management to discipline or discharge employees only for "just and reasonable cause." If these employees are disciplined or fired for complaining about an employer's environmental activities, they can bring a grievance and argue that the dismissal was not just or reasonable.

Second, federal legislation requiring that employees be dismissed only for just cause may protect non-unionized employees. Section 240 of the Canada Labour Code provides that non-unionized employees who work for firms falling under federal jurisdiction cannot be discharged except for just cause.

Even if you are neither unionized nor under federal jurisdiction the courts can use the common law to conclude that you have wrongfully discharged an employee. If the employee is fired for complaining about an employer's environmental performance, the employee can bring an action for wrongful dismissal and collect damages for the loss suffered.

Considering this, it may be better to focus on improving environmental performance and not on punishing employees.

1 S.A. 1994, c. F18.5.
2 S.A.1992, c. E-13.3.

Ask Staff Counsel

Public Land Berry Pickers in a Jam?

Dear Staff Counsel:
I am fond of taking rambles through the outdoors and have done so for many years. Often on my excursions, I've come across berries, which are especially tempting for homemade preserves. Is there any public land in Alberta on which berry picking is allowed without needing any specific permission?

Yours truly, Ima Gleaner

(P.S. Thanks for the help. A jar of homemade berry jam is in the mail.)

Dear Ima:
Whether you can pick berries without permission on public land depends greatly on the classification of that land. Provincial parks and other protected areas, such as Natural Areas, Ecological Reserves and Wilderness Areas, are regulated in accordance with management plans and other rules that state whether certain activities are allowed. Helen Newsham of Alberta Public Lands advises us that generally speaking, removal of natural materials, such as berries, from these areas is not allowed or encouraged.

Regarding other classifications, Ms. Newsham has advised us that members of the public who wish to access public land in the White Area under no disposition (so-called "vacant" lands) for casual hiking and berry picking do not need any special permission. Your local Public Lands office should be able to provide you with more information on such land in your area. You can find your nearest Public Lands office on the Internet at <http://www.agric.gov.ab.ca/navigation/sustain/publiclands/index.html> or by calling the Public Land Management Branch of Alberta Agriculture, Food and Rural Development at (780) 427-3595 (call 310-0000 first for toll-free access). To find out the same information about vacant public land in the Green Area, you should contact your local Land and Forest Service office. You can find your nearest Land and Forest Service office on the Internet at <http://www.gov.ab.ca/env/info/infocentre/contacts.html> or by calling the Alberta Environment Information Centre at (780) 944-0313 (call 310-0000 first for toll-free access).

As you might be aware, the issue of casual access without permission to public lands under agricultural disposition has been a matter of controversy for some time. Indeed the Ask Staff Counsel editor wrote a good part of a book on the issue in 1991 called *Alberta Public Rangeland Law and Policy*. She urged that under the best interpretation of current law, a member of the public may enter onto public land subject to a *Public Lands Act* grazing lease for casual recreational purposes without first getting the lessee's consent, provided that the mode of entry and recreational use would not interfere with the lessee's grazing operations. By contrast, Ms. Newsham of Public Lands suggests that on public land under an agricultural disposition, you must first contact the disposition holder, "primarily for safety reasons". She said that this would include community pastures, which are under grazing disposition to the pasture association. She stated that although provincial grazing reserves are not under disposition and recreational use is encouraged by the provincial government's multiple use philosophy, it is a good idea for public users to contact the local reserve manager first, especially if there is livestock on the reserve.

The provincial government does not have a system for specifically authorizing berry picking. Public Lands advised us that while berry picking is not usually a problem, provincial authorities discourage disruption of public lands by recreational users due to the potential impact on fish and small animal habitat. Practically speaking, the level of concern by provincial authorities will depend greatly on the extent of the activity, whether or not it is being carried on for a commercial purpose, and whether there is a high demand, and thus potential conflict, in a particular area. In other words, someone on foot picking a few berries for their own use does not need Government authorization, but bringing a large berry harvesting crew onto public land in a couple of pickup trucks is a wholly different situation.

You may be interested to know that regulations under Bill 31, the *Agricultural Dispositions Statutes Amendments Act*, have been released in draft form for public review and comment. Among other matters (including compensation for industrial use), the draft regulations propose detailed rules regarding access to land under various classes of agricultural dispositions. A discussion document for the draft regulations can be obtained on the Internet at <http://www.agric.gov.ab.ca/aglease>, or by calling (780) 427-3595 (call 310-0000 first for toll-free access). Comments may be made by mail, fax, e-mail or electronically via the website workbook. Comments are due by January 31, 2000.

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