News Brief

ENVIRONMENTAL LAW CENTRE

Vol. 15 No. 4 2000
ISSN 1188-2565

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British Columbia Introduces Anti-SLAPP Legislation:

Should Alberta SLAPP Back as Well?

In This Issue

What is a SLAPP?

A SLAPP - strategic lawsuit against public participation – is a civil claim that is filed against persons because of their participation in an issue of public concern.[1] The nature of SLAPP suits is described by Justice Singh in *Fraser* v. *Saanich*[2] as follows:

> A SLAPP suit is a claim for monetary damages against individuals who have dealt with a government body on an issue of public interest or concern. It is a meritless action filed by a plaintiff whose primary goal is not to win the case but rather to silence or intimidate citizens who have participated in proceedings regarding public policy or public decision making.

In Canada, several cases have been held characterized as SLAPP suits. These cases involve a range of participation in public decision-making. For instance, in *Fraser* v. *Saanich,*[3] a developer sued several individuals and a municipal corporation for negligence, breach of fiduciary duty, interference with contractual relations, conspiracy of tort, collusion and bad faith. These allegations were directed at individuals who had petitioned for municipal zoning changes and at the municipal corporation for implementing these changes. The court expressly recognized this case as a SLAPP suit. The Plaintiff's action did not succeed.

Another case often characterized as a SLAPP suit is *Daishowa* v. *Friends of the Lubicon*.[4] In this case, Daishowa sought to prevent the boycott of its products organized by the Friends of the Lubicon. As a final example, the case *MacMillian Bloedel* v. *Galiano Island Trust Committee et al.*[5] has been characterized as a SLAPP suit. In this case, claims were made with respect to by-laws passed by the Galiano Island Trust Committee that limited development activities proposed by MacMillian Bloedel. Claims – which were eventually discontinued by MacMillian Bloedel – were also made against a local conservation group that had lobbied for the by-laws. Neither action succeeded.

The most significant impact of SLAPP suits is their negative effects on public participation in decision-making. It takes a considerable amount of financial resources and energy to defend against a SLAPP suit. These are resources which otherwise would be contributed to the debate of a matter of public concern. Furthermore, the focus of the parties involved and the general public is diverted from the original issue of concern to the lawsuit. The removal of the parties from the public decision-making process impedes resolution of the matter of public concern. Finally, the threat of SLAPP suits – with the accompanying financial and personal burdens - discourages public debate and public participation in matters of public concern.

(Continued on Page 2)

Environmental Law Centre *News Brief*
Volume 15 Number 4 2000

The Environmental Law Centre News Brief (ISSN 1188-2565) is published quarterly by the Environmental Law Centre (Alberta) Society

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Non-profit Environmental Organizations: $30 + GST

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(British Columbia Introduces Anti-SLAPP Legislation...continued from Page 1)

British Columbia's Proposed Legislation

In response to the growing number of SLAPP suits, Bill 29 - the *Protection of Public Participation Act* – was introduced in the British Columbia legislature. This Act is intended to provide a mechanism for early identification and dismissal of SLAPP suits, to reduce the economic burden of defending against a SLAPP suit and to create economic disincentives to filing SLAPP suits.[6]

The Act affirms and protects the right to public participation in decision-making processes. A person "may make any communication or engage in any conduct if the communication or conduct is genuinely aimed at promoting or furthering lawful action by the public or by any government body".[7] This does not include communication or conduct that results in damage or destruction of property, results in physical injury, is unlawful, or is an unwarranted interference with the rights or property of any person. No action lies for damages or otherwise against any person for any communication or conduct protected by the Act.

If a Defendant considers that an action is a SLAPP suit, the Defendant may make an application to dismiss the action.[8] Once such an application is made, all further applications, procedures or other steps in the action are suspended until the dismissal application has been heard and decided. Once the court is satisfied by the Defendant's evidence that the action is a SLAPP suit, the onus falls on the Plaintiff to demonstrate:[9]

1. the action is not a SLAPP suit; or
2. the Plaintiff has a reasonable probability of proving at the hearing of the action that it is not a SLAPP suit.

If the court ultimately determines that the action is a SLAPP suit, the defendant may obtain an order dismissing the action.[10] The Defendant may also obtain an order directing the Plaintiff to pay all reasonable costs and expenses incurred by the Defendant, including all of the Defendant's reasonable legal fees and disbursements. In addition to these costs and expenses, the court may award punitive or exemplary damages against the Plaintiff.

Should Alberta SLAPP Back as Well?

As the concern about the use of SLAPP suits seems to be growing, what should be done in Alberta to address this issue? Should Alberta merely modify the rules of civil procedure as set out in the *Alberta Rules of Court*? Or should Alberta follow the lead of British Columbia and introduce anti-SLAPP legislation?

While there are currently procedural mechanisms to dismiss scandalous, frivolous and vexatious claims in the *Alberta Rules of Court*, these may not be adequate to address SLAPP suits. The courts are reluctant to dismiss actions on these grounds except in clear and obvious cases demonstrated by the Defendant. In addition, the costs provided in the *Alberta Rules of Court* are typically insufficient to fully compensate the Defendant in a SLAPP. Perhaps these concerns could be addressed by mere modification of the rules of civil procedure.

(Continued on Page 8)

The Staff of the Environmental Law Centre extend sincere wishes for a joyous holiday season and a safe and prosperous New Year.

By Jillian Flett, *Alberta Environment*

Public Reporting on Alberta Environment's Compliance Assessment and Enforcement Activities

The last article in Enforcement Briefs provided an overview of the Compliance Assurance Principles ("Principles") that were recently released by Alberta Environment ("AENV"). The purpose of the Principles is to ensure consistency, clarity and coordination in the compliance assurance programs for the legislation AENV delivers. This article outlines steps that have been taken for public reporting on AENV's inspection and enforcement programs.

AENV is responsible for enforcing over 20 pieces of legislation including the *Forest Act, Wildlife Act, Water Act* and *Environmental Protection and Enhancement Act.* In the past, each program area has been responsible for reporting on its enforcement activities. As part of the Principles, AENV has committed to providing a department wide summary of its enforcement activities to the public on a regular basis.

The first department wide annual enforcement report was entitled "Annual Report Enforcement Activities 1998-99". It outlined:

- the number of enforcement actions undertaken (e.g. warnings, prosecutions, administrative penalties and orders) for each specific legislative area,
- the results of the enforcement actions (e.g. amount of penalties/fines, number of authorizations suspended) and
- enforcement program highlights.

The Principles also commit AENV to develop annual compliance assessment plans. The compliance assessment plan outlines AENV's targets for conducting proactive, unannounced inspections, audits and reviews to determine whether specific regulated communities are complying with the legislation. The plan identifies the targeted regulated community and number of compliance assessments that will be conducted for that regulated community. Compliance assessments include:

- Inspections (i.e. site verifications visits to determine compliance)
- Audits (i.e. a site/field visit to verify that designated methods/procedures for data gathering meet quality control standards and therefore ensure the data is reliable) and
- Reviews (i.e. an assessment of mandatory reports submitted by regulated parties to determine compliance)

The second department annual enforcement report has been expanded to include information on compliance assessment activities. In addition to enforcement statistics, the **Compliance Assessment and Enforcement Activities Annual Report** for 1999-2000 includes the number of compliance assessments for targeted regulated communities that were carried out in 1999-2000 and the targets planned for 2000-2001.

The following factors are taken into consideration in identifying targets in the compliance assessment plan:

- risk to the resource or environment associated with a particular activity/operation,
- compliance history of regulated parties associated with the activity/operation, and
- trends and emerging resource management issues.

The plans are carried out by Department officers, investigators and inspectors in addition to their other responsibilities such as, responding to public complaints or environmental emergencies and investigating reports of non-compliance. The plans are developed with the recognition that they may be modified to reflect changing priorities and the resources needed to respond to varying numbers of complaints, environmental emergencies and reports of non-compliance.

The annual compliance assessment planning initiative benefits regulators, the public and the regulated community through ensuring a more focussed and coordinated inspection program. It increases public confidence in the level of compliance in a specific regulated community by identifying non-compliance that may not otherwise have been reported. It also helps educate the regulated community on legislative requirements by having inspectors in the field actively promoting compliance.

Copies of the report will be available from AENV's Information Centre in Edmonton at 780-427-2079 and in Calgary 403-297-3362 or on the internet at http:// www.gov.ab.ca/env/protenf/enforcement/index.html.

In Progress

In the Legislature...

Federal Legislation

Bill C-27, the *Canada National Parks Act*, was passed by the House June 13, 2000, received Royal Assent October 20, 2000. The Act revises and consolidates the previous *National Parks Act*.

Federal Regulations

A number of changes have been made to the *Migratory Birds Regulations*, effective August 23, 2000. The Regulations specify hunting zones, seasons, and possession limits.

The *National Parks Wilderness Area Declaration Regulations* are in force as of October 19, 2000. The Regulations set out wilderness areas within Banff, Jasper, Kootenay and Yoho national parks.

Alberta Regulations

Several regulations under the Electric Utilities Act have been amended including

- the *Independent Power and Small Power Regulation* (AR 285/95)
- the *Time Extension Regulation* (AR 162/98)
- the *Revenue Adjustment Regulation* (AR 179/2000).

As of September 1, 2000, the *Ozone-depleting Substances Regulation* (AR 125/93) under the *Environmental Protection and Enhancement Act* is repealed and replaced by the *Ozone-Depleting Substances and Halocarbons Regulation* (AR 181/2000).

Cases and Enforcement Action. . .

Court of Queen's Bench Justice Erik Lefsrud has quashed the decision of the Minister of Environment, upholding the approval for the expansion of the Ryley landfill. A number of recommendations concerning reviewing the effects of the expansion on nearby residents had been made by the Alberta Environmental Appeal Board but were substantially ignored without reasons. The Court concluded that it was unreasonable to reject the Board's recommandations without reasons.

The Joint Review Panel of the Canadian Environmental Assessment Agency and the Alberta Energy and Utilities Board looking into the Cheviot Coal Project released its decision recommending the project be given regulatory approval. The Panel determined the project to be in the "public interest" and most of the environmental effects to be "insignificant". This decision follows the second set of public hearings. The recommendation for approval goes to the federal Cabinet for a final decision.

A North American Free Trade Agreement tribunal ruled November 13, 2000 that the Canadian government must compensate S.D. Myers Inc. of Ohio for banning the export of PCBs to the USA. The amount of the compensation will be determined later.

A Provincial Court Judge assessed a penalty of $201,000 to the City of Calgary after the City plead guilty to the release of chlorine gas from the Bearspaw water treatment plant in 1998 contrary to section 98(2) of the *Environmental Protection and Enhancement Act*. The penalty consists of a $1,000 fine and a creative sentence determined to be in excess of $200,000 requiring the City to receive ISO/CD 14001 certification for its Bearspaw and Glenmore water treatment facilities by August 2003 and make a presentation on the incident to the Western Canada Water and Wastewater Association annual meeting in October 2001.

Provincial Court Judge Bradley assessed a fine of $25,000 to Genesis Exploration operating near Whitecourt after the company was found guilty of allowing petroleum condensate to enter Old Man Creek. The Judge also assessed a creative sentence of an additional $25,000 to go to the Alberta Conservation Association to be used for the maintenance and restoration of fish habitat in the area.

A Provincial Court Judge convicted Rural Aviation Corporation and Peter Ronald Allomes of changes connected with improper aerial application of a pesticide. Penalties assessed to Mr. Allomes were $500 on each of two counts and a fine of $7,500 to the Corporation on one count for the first occurrence. The Corporation was assessed a fine of $7,500 and restitution of $7,000 payable to the complainants for charges from the second date.

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

In Progress reports on selected environmental activity actions of the legislature, government, courts and tribunals. A more complete report on these matters can be obtained by subscribing to the *Regulatory Review*, a monthly subscription report prepared by the Environmental Law Centre. To subscribe or obtain further information call (780) 424-5099 or visit our website at www.elc.ab.ca.

Researching Environmental Law on the Internet*

Websites useful in researching environmental law are proliferating. This article will refer to general sites rather than the many appropriate for background subject research. The body or person responsible for the site is identified to make it easy to rediscover in the site changes location.

A starting point for any search on environmental law is a website that provides access to the laws themselves. Legislation for many Canadian jurisdictions is accessible via the Access to Justice site at <www.acjnet.org/>. This site serves as a springboard to locating a variety of legislative materials for the federal level and an increasing number of the provinces and territories. Following the link for 'Legislative Materials' allows one to select a jurisdiction and scan the types of materials accessible from there. For example, one can link to the Federal Department of Justice for federal statutes and regulations or to the Queen's Printer of Alberta for provincial statutes and regulations. For many of the jurisdictions, links are also available to sites that provide the text of proposed Bills and perhaps a table showing progress of Bills through the respective Legislature. Users should be cautioned that some of the links provided are in need of updating. For example, at the federal level, information on the current progress of Bills must be accessed via the link 'Committee Business: House of Commons' and then 'Government Bills' or 'Other Bills' rather than the 'Progress of Legislation' or 'Status of House Business' link. The ACJNet site is also very useful for accessing case law, a topic mentioned in greater detail below.

In addition to knowing the text of the laws it is also important to have some background information as a springboard to more in-depth research. The North American Commission for Environmental Cooperation site at <cec.org/pubs_info_resources/law_treat_agree/summary_enviro_law/publication/index.cfm?varlan=english> provides a valuable *Summary of Environmental Law in North America*. From this site one can access overview information pertaining to environmental law, for each of the three jurisdictions participating in the Commission, Canada, Mexico, and the United States. Topics presented include 'Public Participation' 'Environmental Impact Assessment', 'Waste Management', 'Mining', and 'Conservation of Biological Diversity and Wildlife' as examples. To locate the information, users click on the appropriate flag provided for each subject area. It is worth book-marking this exact site, as accessing it off the main page of the Commission is not immediately evident. If users prefer, the Summary can be found by going to <http://cec.org/>, selecting 'English', then selecting 'Publications and Information Resources', then 'Laws, Treaties and Agreements', and last 'Summary of Environmental Law in North America'.

A third aspect of researching environmental law can be obtaining the text of treaties and further information on the signing and ratifying of them. If one selected the route mentioned above as an alternative to locating the overview of environmental law, one would have noticed the option 'Transboundary Agreements Infobase'. This is a database of more than 200 agreements and treaties on transboundary environmental cooperation in North America. The database can be searched by subject, agreement name, or by parties to the agreement. Links to the full-text of the agreement are provided where possible, as is an overview and contact information for further information. The database is located at <cec.org/pubs_info_resources/law_treat_agree/transbound_agree/index.cfm?varlan=english>.

Users may also wish to pursue the application of environmental law by accessing judgments of various courts. Fortunately, the ability to access judicial decisions via the Internet is also increasing. The Access to Justice Network mentioned previously provides a ready link to the decisions of courts in a number of jurisdictions. If a court link is provided, it is worth following it, as the name is not always an accurate reflection of what is provided at the end. A number of sites to be aware of are:

- <www.fja.gc.ca/en/cf/decisions.html> for Federal Court of Canada decisions. The decisions, dating back to 1993, can be searched by subject, volume, or case name. The Federal Court of Canada site can also be accessed directly at <www.fct-cf.gc.ca/business/hearings/hearing_list_e.shtml>. If users choose this route, they can also access material on the operation of the court, scan a 'what's new' list, and check hearing lists.
- <www.albertacourts.ab.ca/webpage/jdb/jdb.htm> for Alberta Court of Appeal and Alberta Provincial Court judgments back through 1998. Users should know that the database does not include every judgment by the respective courts.
- <www.lexum.umontreal.ca/csc-scc/en/index.html> for decisions of the Supreme Court of Canada, currently back to 1986. Other information on the Court can be accessed through here as well.

In addition to the above, it is often necessary to identify subject specific sites. Two sites that serve as useful portals are:

- <www.findlaw.com/index.html> While this is U.S. based, it does guide users to Internet based resources in environmental law.
- <www.llrx.com/features/ca.htm> Titled *Doing Legal Research in Canada*, this is on the site of the Law Library Resource Exchange, LLRX. Again, it is U.S. based, but does provide a valuable introduction to legal research in Canada as well as links to the catalogues of Canadian law libraries.

Finally, visit the website of the Environmental Law Centre at <www.elc.ab.ca>. It includes briefs and submissions authored by Centre lawyers, answers to frequently asked environmental law questions, and access to the catalogue of the Centre's public library.

■ **Dolores Noga**
Staff Librarian
Environmental Law Centre

**This article was originally published in Encompass Magazine December/2000 issue*

Case Notes

AENV Director's Discretion in Writing Approval Conditions is Broad

Ainsworth Lumber Co. Ltd. and Footner Forest Products Ltd. v. *Director, Northwest Boreal Region, Alberta Environment*, (26 June 2000) 00-004 & 00-005 (EAB)

McCain Foods (Canada) v. *Director, Prairie Region, Alberta Environment*, (20 July 2000) 99-138 (EAB)

Two recent Environmental Appeal Board decisions have reinforced the breadth of the Director's discretion in the issuance of Approval conditions under the *Environmental Protection and Enhancement Act*[1] ["the Act"]. The first case deals with approval emission limits that are more stringent than those set out in the applicable regulation. The second decision highlights the broad nature of the Director's discretion to include general conditions in an approval.

First, Ainsworth and Footner both appealed their approvals permitting the operation of two oriented strand board manufacturing plants near Grande Prairie and High River, respectively. The Director had based the approval emission limits on the policy of technology-based standards, which requires the implementation of the best available technology, rather than applying the emission limits specified in the *Substance Release Regulation*[2]("the Regulation").

Both Appellants argued that, regardless of the Director's discretion to impose more rigorous constraints, the limit for rural particulate emissions prescribed in the Regulation (0.60g/kg of effluent) should apply, unless there is some evidence of adverse environmental effects necessitating a more stringent standard. The companies took the further position that the emission limits set out in the Regulation should, as a matter of law, take precedence over any informal policy being applied at the Director's discretion. The Appellants also argued that in issuing approvals, the Director should consider the principle of sustainable development and balance environmental protection with economic considerations.

In deciding that the Director's discretion was reasonable, the Board first considered whether the approval-specified emission limits could be achieved and whether they were consistent across the industry. The Board found that both Appellants were aware of the use of technology-based particulate emission standards prior to the issuance of their approvals and would have no difficulty meeting them. In fact, Ainsworth had been achieving the more stringent approval limit of 0.20g/kg of effluent for the past five years. Similarly, Footner had already guaranteed that its emission levels would be only a fraction (25%) of those specified in its approval through the use of best available technologies. The Board also found that all six plants manufacturing oriented strand board under approvals in Alberta were required to meet the particulate emission limit of 0.20g/kg of effluent. Further, the discretion exercised served the purposes of the Act, in that the Director's decision was consistent with the goal of protecting air quality as an integral element of the environment's ecosystems and human health.

The Board decided that the Director's discretion to impose more rigorous limits was properly and reasonably exercised in the context of the authority provided under s. 65(2) of the Act and regulations. The Director need not consider any specific factors or criteria in exercising his discretion, nor should consideration of sustainable development restrict the Director. The principle that resources should be developed in a manner that is sustainable for use by future generations does not prevent the Director from imposing more stringent standards for emissions.

In the second case, McCain appealed one condition of its approval allowing it to operate and reclaim a potato processing plant near Chin, Alberta. The impugned condition provided a general prohibition against the emission of air contaminants that cause or may cause the alteration or impairment of natural resources, material discomfort or adverse effects on human well being or health, or harm to property or plant or animal life. McCain argued that the inclusion of the condition exceeded the Director's jurisdiction, because s. 98 of the Act only prohibits harmful air emissions that cause significant adverse effects, which precludes the Director from setting general approval conditions. In addition, McCain argued that determining general emission limits is a policymaking function that should be exercised by the Legislature, not the Director.

The Board dismissed McCain's appeal, stating that s. 65 of the Act provides broad discretion to the Director to impose emission limits, and s. 98 does not dictate a standard to define or restrict that discretion. Rather, s. 98 was intended to apply to emissions that were not otherwise covered by applicable approval conditions.

The Board also rejected McCain's arguments regarding policymaking. Instead, the Board found that the Director must make numerous policy judgements in deciding whether to issue approvals and to translate a significance standard into appropriate approval conditions, whether they are general or specific.

The Board further recognized that general approval conditions provide "a back up function for specific conditions by accounting for the cumulative effects of individually regulated pollutants and of fugitive emissions that are difficult to control directly."[3] The general emission limit plainly intends to address cumulative effects, so further justification is not necessary. The Director need not have evidence of cumulative effects prior to taking this proactive step, nor does such a general limit place McCain at the mercy of the Director's

(Continued on Page 8)

Case Notes

Minister Must Give Reasons for Failure to Follow EAB Recommendation

Fenske v. *Alberta (Minister of Environment)* (21 September, 2000) Edmonton 0003-02502 (Alta. Q.B.)

The *Environmental Protection and Enhancement Act*[1] ("EPEA") created the Environmental Appeal Board to hear appeals of certain decisions made under the Act. In most cases the Board does not decide the matter on appeal. Rather, it makes a recommendation to the Minister of Environment who makes the actual decision.

In 1996, a strong privative clause was added to EPEA. Section 92.2 reads:

> Where this Part empowers or compels the Minister or the Board to do anything, the Minister or the Board has exclusive and final jurisdiction to do that thing and no decision, order, direction, ruling, proceedings, report or recommendation of the minister or the Board shall be questioned or reviewed in any court, and no order shall be made or process entered or proceedings taken in any court to question, review, prohibit or restrain the Minister or the Board or any of its proceedings.

In actual fact, the existence of the privative clause does not usually prevent a court from reviewing decisions made under the Act. It does, however, help suggest the standard of review that will be used by the court. In other words, the court may usually still review a decision despite the privative clause, but it will be more restrictive on what it considers to be reviewable errors.

Fenske v. *Mar*[2] is a judicial review of a Minister's decision under EPEA. The Beaver Regional Waste Management Services Commission had obtained an amending approval from Alberta Environment to expand a small landfill. The expanded landfill was designed to handle a large volume of waste from several urban areas including Edmonton and Vancouver. The landfill would cover a full quarter section of land and, including what would be buried and what would be above the ground, would be equivalent to a nine-storey building.

Nearby families appealed the amending approval to the Environmental Appeal Board. After a three-day hearing, the Board gave its recommendations. The Board was very critical of the decision to grant the amending approval. It concluded that it was "at the 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."[3]

Among other things, the Appeal Board recommended that:

- the Commission be required to make a new application supported by an environmental impact assessment,
- there be consultation with the public, health and local officials before a decision is made on the application, and
- a buffer zone be considered to deal with the problems of litter, noise, odor and health effects raised by the neighbours.

The Board's recommendations went to the Minister of Environment who ignored the recommendations of the Board and simply directed implementation of the Director's decision with the requirement of certain reports and a public meeting. The Minister failed to provide any written reasons for the decision he reached.

The neighbours who appealed to the Environmental Appeal Board applied for judicial review of the Minister's decision. The application came before Mr. Justice E.S. Lefsrud.

Mr. Justice Lefsrud first examined the appropriate standard of review that should be used. This was based on the degree of deference that should be given to the Minister's decision. If little deference is to be given the decision, the court is free to correct any mistake that it feels the Minister has made. A middle deferential standard sees the court interfering only if the minister's decision is unreasonable. The most deferential standard is one where the court acts only on patent unreasonableness.

In deciding upon which standard to use the judge considered:

(a) the presence of a privative clause,
(b) the expertise of the tribunal,
(c) the purpose of the legislation, and
(d) the nature of the decision being reviewed.

After considering these matters, the judge concluded that a high level of deference should be given to the Minister's decision. However, since the Board gave detailed reasons for its recommendations and the Minister gave no reasons for his decision, the court was left with no way of knowing why the Minister decided what he did. That reduced the deference that the court would give to the Minister's decision to a standard of review of simple reasonableness.

The Judge concluded that the differences between the Board's recommendations and the Minister's decision were substantive and significant. He said that:

> The appeal procedure set up in the Act clearly envisions the Board and the Minister playing a joint role in decision-making. While the recommendations of the Board do not bind the Minister, surely the Minister cannot disregard the recommendations of the Board as mere opinion with which he disagrees.

(Continued on Page 9)

(British Columbia Introduces Anti-SLAPP Legislation. . .continued from Page 2)

However, introduction of anti-SLAPP legislation may more effectively address these concerns. Legislation can provide clear, detailed guidance about the dismissal of SLAPP suits. Legislation can remedy the costs incurred by Defendants in SLAPP suits. Perhaps most significantly, legislation can affirm and protect a substantive right to participate in public decision-making processes. Great strides have been made to encourage and support public participation in environmental decision-making. But an extra step is required – the right to public participation must also be actively protected.

■ **Brenda Heelan Powell**
Staff Counsel
Environmental Law Centre

1 For more information about SLAPP suits in Canada, refer to C. Tollefson, "Strategic Lawsuits Against Public Participation: Developing a Canadian Response" (1994), 73 Can. Bar Rev. 200, C Tollefson, "Strategic Lawsuits and Environmental Politics: *Daishowa Inc. v. Friends of the Lubicon*" (1996) 31 J. Can. Studies 119, and Attorney General of British Columbia, *Discussion Paper: Developing a response to Strategic Lawsuits Against Public Participation (SLAPP) in British Columbia*" (2000, British Columbia) which can be viewed at http://www.ag.gov.bc.ca/slapp.
2 [1999] B.C.J. No. 3100 (B.C. S.C.).
3 *Ibid*
4 (1998), 27 CELR (NS) 1.
5 [1995] B.C.J. No. 1763 (B.C. C.A.).
6 See Attorney General of British Columbia, *supra*, note 1.
7 Section 2.
8 Section 3
9 Section 4.
10 Section 5.

(AENV Director's Discretion . . . continued from Page 6)

discretion anymore than the general wording of s. 98. Also, the use of a general approval condition benefits approval holders, because it saves them having to collect the data necessary to establish specific emission limits.

Finally, the Board rejected McCain's submission that the general condition was not necessary to address cumulative effects, because s. 98 could deal with any such effects. If an adverse effect was complained of, but McCain's individual pollutant emissions were within each of their specified limits, then McCain could argue that its cumulative emissions were authorized by the approval, and s. 98 would be inapplicable. A general condition eliminates this problem.

Thus, while dismissing both the McCain and Ainsworth/Footner appeals, the Board underscored the Director's broad discretion in the issuance of approval conditions to "support and promote protection, enhancement and wise use of the environment."[4]

■ **Shannon Keehn**
Alberta Environment

1 S.A. 1992, c. E-12.3.
2 A.R. 124/93.
3 *McCain Foods (Canada) v. Director, Prairie Region, Alberta Environment*, (20 July 2000) 99-138-R, at 10.
4 *Supra* note 1, s.2.

Administrative Penalties

The following administrative penalties over $2,000 were issued under the *Environmental Protection and Enhancement Act* since the last issue of *News Brief*:

- $3,500 to Rumile Contracting Ltd. of Edmonton for improper storage of used oil contrary to the *Waste Control Regulation* and for failing to remediate the spills of used oil in violation of s.101 of the *Environmental Protection and Enhancement Act*.
- $7,000 to Anderson Oil & Gas Inc., formerly Ulster Petroleum Ltd., operating in Kneehill County for failing to operate the stack at a sour gas plant in accordance with their limits thus permitting excess emissions of sulphur dioxide and failing to report the contraventions immediately upon discovery of them. The penalty was assessed under s.213(e) of the *Environmental Protection and Enhancement Act*.
- $8,500. to Fenz Sulfer Works Inc. of the Municipal District of Rocky View No. 44, operators of the Irricana sulphur processing plant for failing to analyze the parameters prior to releasing the industrial run-off collection pond, releasing in excess of the specified limit, failing to sample the parameters as required throughout the release, failing to immediately report the Approval contraventions, and failing to provide information on the baghouses and scrubbers in their Monthly Air Emissions Summary reports.
- $7,000 to the City of Grande Prairie for failing to submit biofilter as-built drawings and a biofilter operating and maintenance manual by the date specified, failing to submit biofilter monthly monitoring reports for a year, failing to submit a summary of the operating and monitoring of the biofilter in the 1998 annual report, and failing to submit a design report for the multicompartment sludge storage cell by the Approval specified date.
- $4,000. to Titan Foundry Ltd. of Edmonton for operating process equipment when the pollution abatement equipment was not fully operational and failing to immediately report the contravention of their Approval.
- $2,500 to Paramount Resources Ltd. operating in the Municipal District of Opportunity for failing to file the annual report summarizing the performance of all process wastewater facilities and failing to file the Annual Summary and Evaluation report for the North Liege sour gas plant operation and air contaminant emissions, all by the dates specified in the Approval.
- $2,500. to Shell Canada Limited operating in the Municipal District of Rocky View No. 44 for releasing sulphur dioxide at the Jumping Pound sour gas plant.

The following administrative penalties over $500 were issued under the *Public Lands Act* and *Forests Act* since the last issue of *News Brief*:

- $32,500. to Buchanan Lumber of High Prairie for unauthorized impedance of the natural flow of water in a number of watercourses on their coniferous timber licence in violation of s.100(i)(i)(ii) of the *Timber Management Regulation*.
- $4,200. to the Badland Hills Grazing Association of Taber for unauthorized use of public land contrary to s.47(1) of the *Public Lands Act*.
- $4,968.40 to Dynamic Oil & Gas Incorporated of Richmond, BC for unauthorized use of public land contrary to s.47(1) of the *Public Lands Act*.
- $750. to Suncor Energy Inc. of Calgary for unauthorized use and contravening terms and conditions of their licence contrary to s.47(1) and 47.1 of the *Public Lands Act*.
- $708. to Clarence Douglas of Milk River for unauthorized use of public land on a lease contrary to s.47(1) of the *Public Lands Act*.
- $1,100. to Corsair Exploration Inc. of Calgary for unauthorized use and contravening terms and conditions on their lease in violation of s.47(1) and 47.1 of the *Public Lands Act*.
- $1,000. to Brewster Lumber Division Ltd. of Peace River for unauthorized timber harvest and contravening terms and conditions of their annual operating plan in violation of s.10 of the *Forest Act* and s.100(a) of the *Timber Management Regulation*.
- $2,000. to Renaissance Energy Ltd. of Calgary for contravening terms and conditions of their licence in violation of s.47.1 of the *Public Lands Act*.

Environmental Law Centre Donors - 1999

The Environmental Law Centre extends its gratitude to those individuals, companies and foundations that made a financial contribution to support the Centre's operations in 1999. They are:

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(Minister Must Give Reasons . . . continued from Page 7)

> Presumably, the legislature did not set up the appeal procedure before the Board without a valid purpose. If the Board raises serious concerns about the environmental ramifications of a project, I am of the view that the Minister must take the Board's recommendations seriously. This does not mean that the Board is able to bind the Minister; however, it certainly suggests that the Minister should give clear reasons for proceeding in a situation where strong concerns have been clearly voice by the Board.

Although there is no requirement under EPEA or the common law that the Minister provide reasons for his decision, the Judge concluded:

> In my view, it was a violation of the rules of fairness when the Minister failed to give reasons. As the Board's report indicates, the Minister's Order has a serious impact on the Applicants' lives. The Approval may have a serious impact on the value of their homes, their enjoyment of daily life in those homes, and most importantly, their health.
>
> However, an even more significant consideration is the appearance of an abuse of process. In this case, the only reasons available to anyone outside the Minister's office are those of the Board. Those reasons contain a strongly worded sentence suggesting a possible abuse of process. The Board made recommendations based on those reasons, not the least of which was a recommendation that the Amending Approval should not be granted before issues such as necessity, viability and the effect on the Applicants are addressed, and the Applicants and other interested members of the public have a chance to respond. The Minister, after reviewing the report and recommendations, disregarded that recommendation without any reasons. Under the circumstances, such an approach is clearly unreasonable and is of necessity rejected.[4]

Accordingly the court quashed the Minister's decision with "the strong recommendation that he reconsider the matter, giving full consideration to the recommendations of the Board and that in the end result, regardless of the decision which he makes, he provides written reasons."[5]

This decision means that the Minister of the Environment must give reasons for decisions which are not in harmony with the recommendations of the Environmental Appeal Board. The Minister has appealed this decision to the Court of Appeal who will have the next say.

■ **Andrew Hudson**
Staff Counsel
Environmental Law Centre

1 S.A. 1992, c. E-13.3 as amended.
2 Reasons for Judgement of the Honourable Mr. Justice E.S. Lefsrud, Court of Queen's Bench of Alberta, Action No. 0003-03502, September 21, 2000.
3 *Ibid.* p. 3.
4 *Ibid.* p. 13
5 *Ibid.* p. 14

Greetings, Farewell and Congratulations!

Welcome Aboard

Robert Williams

The Environmental Law Centre is pleased to welcome Robert Williams, who joins us as Staff Counsel on January 2, 2001.

He has a law degree from the University of Alberta, a Masters in biology from Acadia University and he holds a Ph.D. in zoology from the University of Alberta.

Robert is a welcome addition to the members of our staff counsel, and will be a great asset to the Information and Referral and other programs that are carried out by the lawyers and staff at the Environmental Law Centre.

Exit Stage Right

By Andrew Hudson

All the world's a stage,
And all the men and women merely players:
They have their exits and their entrances;
And one man in his time plays many parts....
- from *As You Like It* by William Shakespeare

Now is the time for me to exit from the Environmental Law Centre. The part as staff counsel has been an enjoyable one. I thank all of the other players for making it so pleasant. I will miss them and the work here. Where the environment is concerned there are no small parts. My next entrance is in Calgary with the National Energy Board Legal Services.

As a complete aside, my word processor tells me that there are two grammatical errors in the above quotation. It even has the nerve to make suggestions for fixing them. Isn't it amazing what we think we can improve. We need to learn when to leave good enough alone: with Shakespeare and with nature. The Environmental Law Centre helps with the latter.

2000 Mactaggart Essay Prize Winners

Dayna Scott

The Environmental Law Centre is pleased to announce the winning essays for the 2000 Sir John A. Mactaggart Essay Prize in Environmental Law. The first prize was awarded to Dayna Scott from Osgoode Hall Law School for her essay: *Carbon Sinks and the Preservation of Old Growth Forests Under the Kyoto Protocol*. Second prize was awarded to Mark Coleman from the University of Alberta for his essay: *American Sulfur Dioxide Emissions Trading Legislation: Is it the "Blueprint" Canada Should Follow in Implementing a Greenhouse Gas Emissions Trading Program?*

Members of the 2000 volunteer selection committee were: Alastair Mactaggart (Honourary), Judith Hanebury, Q.C., National Energy Board (Chair), Steven Kennett, Canadian Institute of Resources Law, Brian O'Ferrall, Q.C., Bennett Jones, Elizabeth Swanson, TransCanada Pipelines.

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 Dennis R. Thomas, Q.C., *Fraser Milner Casgrain*

Statutory Appeals - The Poor Man's Injunction

You live in a city in an older neighborhood and your new neighbor wants to redevelop a set of four-plexes into a group home for reformed pedophiles. Or, you live in the country, and your neighbor has decided to develop a huge pig barn. In either case, your home, your major investment, is under serious threat. A real estate agent has advised you that your property value will plummet!

The developer has hired an irritating consultant to consult you to death, and planners and politicians have stated vaguely that they will "address" your concerns. You have concluded that no one can really address your major concern: the loss of value of your home. Your neighbor chants the mantra of "economic benefits" stating loudly that he must go forward immediately or the benefit will be lost to the community. This is a signal to you that delaying his development permit may help you protect the value of your home.

What are your legal options? Are there mechanisms available to stop this development in its tracks? Obtaining an injunction in the Courts is the traditional remedy, but it has serious drawbacks. The legal test for an injunction is very strict. And if you do get it you will likely have to undertake to pay damages if the injunction is not sustained at a later trial.

Fortunately for you, in Alberta there is a "poor man's injunction." This more practical alternative is found in the statutory appeal process. Appeals of development approvals exist under all land use bylaws passed by municipalities under the provisions of the *Municipal Government Act* ("MGA"). These appeals from the decision to issue a development permit are to a subdivision and development appeal board ("SDAB"). There are other types of statutory appeals in Alberta, however this note deals only with appeals of development permits.

Under most land use bylaws, an appeal to an SDAB will suspend the development permit until the appeal is decided. The MGA requires an SDAB to move the process along fairly quickly, with the result that there is not much potential for delay at this level. It is important, nevertheless, to have a position on the merits to make to the SDAB, and this can typically be found by raising issues about traffic, effect of lights, noise or odor. If the strategy is to delay the project, then some attention should be paid to developing legal issues in the submissions to the SDAB. Examples of legal questions include the interpretation of the definitions and the calculation of setbacks.

Predictably, the SDAB will side with the developer and approve the permit, albeit with some conditions which will be imposed to "address" your concerns.

It is at this point that the potential for creating significant process delays arises under the MGA. Section 688(1) of that Act allows for you to apply for leave to appeal a decision of the SDAB to the Alberta Court of Appeal. There is a strict time limit for such applications, and they must be filed and set down for hearing within 30 days from the issuance of the SDAB decision. Typically, such applications are set down and then adjourned beyond the 30-day period for an actual hearing before a single Justice of the Court of Appeal.

The potential for delay arises in this way. The typical land use bylaw in Alberta suspends a municipal development permit while the appeal process proceeds in the SDAB and then in the Court of Appeal. Even if it does not it would be a very gutsy developer who would proceed in the face of an appeal to the courts. The practical result of the suspension is that the developer could not obtain a building permit needed to get construction underway.

Typically, it will take two to three months to finalize and present an application for leave to a single Justice of the Court of Appeal. If presented well, the application can result in leave being granted, and it can then take up to a year for the actual appeal to be heard by the full Court of Appeal. In some cases, the appeal to the full Court of Appeal will be successful, the project will be remitted back to the SDAB and the whole process will start again.

In some cases, leave will be refused, but this can also be appealed to the full Court. In one case involving competing liquor stores in Edmonton, the competitive proposal was delayed for over two years while the opponent sought to appeal a leave refusal to the full Court of Appeal and then on to the Supreme Court of Canada. While ultimately unsuccessful, the existing liquor store operator was able to stop the proposed competing store for over two years.

While that is an example of extreme delay, it does make the point that delay can render a project uneconomic or financially exhaust the developer, or both. There is nothing illegal about this strategy and, apart from the costs of a lawyer, this is a much more economic approach than pursuing the conventional injunction application in the courts.

There are parallel opportunities under other Alberta statutes, such as appeals of approvals under the *Alberta Environmental Protection and Enhancement Act* to the Environmental Appeal Board, and then on to the courts through judicial review. These challenges are not assured of actually stopping a project unless a stay of the approval is sought, pending the outcome of the appeal. While these parallel processes are available, they are more expensive and less effective than the appeal procedures available through land use bylaws and the MGA, which truly do provide a "poor man's injunction."

Ask Staff Counsel

Down in the Dumps Over the Dump

Dear Staff Counsel:
We recently moved to the country where we plan to bottle and sell the exceptional water that comes from a spring on our property. Right after we moved in we learned that the local county is building a new landfill. We have heard that one of the possible sites is near our acreage. We are concerned about the effect of the landfill on our business, not to mention our health. What can we do to make sure our concerns are addressed?

Sincerely, Mr. H. Tuo

Dear Mr. Tuo:
Landfills are regulated both under the *Municipal Government Act* ("MGA") and the *Environmental Protection and Enhancement Act* ("EPEA").

Regulations under the MGA establish minimum buffer zones between landfills and residences, hospitals, schools and food establishments. Most other aspects of landfill siting and operation are set by regulations under EPEA.

The *Subdivision and Development Regulation* under the MGA requires that there be at least a 450 metre buffer zone between the landfill cells and your property line. However, the Deputy Minister of Alberta Environment does have the authority to reduce the size of this buffer zone. There is no formal procedure under which the Deputy Minister exercises this authority but failure to allow you to be heard before exercising it may allow the courts to interfere in the decision.

This buffer zone is quite minimal so you will be interested in the regulations that apply under EPEA. How much say you have under EPEA will depend upon the nature and the location of the landfill.

If the landfill will:

1. accept hazardous waste,
2. receive more than 10,000 tonnes of garbage each year, or
3. be located in a ravine, gully, coulee or over a buried valley,

then the county will need to obtain an approval under EPEA and you will have significant opportunity to express your concerns. If the landfill will not accept hazardous waste, will be relatively small and will not be located on a ravine, etc. then your input will be much more limited.

If the County is required to obtain an approval then certain detailed steps set out in EPEA apply. A director within Alberta Environment is charged with making the decision on whether to issue the approval and with setting the terms and conditions of the approval. As a neighbour, you must be notified of the application and will have a right to file a "statement of concern" with Alberta Environment. This statement is important for several reasons. Firstly, the county must formally address the concerns raised in your statement. Secondly, the director must consider the concerns prior to making any decision on the application for the approval. Thirdly, this statement of concern is a precondition to being able to appeal the decision of the director to the Environmental Appeal Board.

The Environmental Appeal Board is an independent tribunal that hears appeals from environmental decisions. If you have filed a statement of concern but an approval is nevertheless granted, you may appeal the granting of the approval to the Board. Similarly, if the director refuses the application, the county can appeal the refusal to the Board.

The Environmental Appeal Board does not decide on appeals for approvals but rather makes recommendations on those appeals to the Minister of the Environment. The Minister is then free to make whatever decision the Minister thinks is best. A recent court decision has held that the Minister must, however, give reasons for his decision or the court may quash the decision and force the Minister to decide again (See Minister Must Give Reasons for Failure to Follow EAB Recommendation article at p. 7).

For smaller, less critical landfills, the situation is different. In those cases the county need only obtain a registration from Alberta Environment. There is no obligation to give notice to neighbours of an application for a registration. There is no opportunity to file a statement of concern, nor is there the right to appeal the decision to the Environmental Appeal Board. In fact, provided that the landfill fits the criteria for a registration, it is routinely granted.

A landfill that is given a registration must operate according to the *Code of Practice for Landfills* which basically sets generic terms and conditions that apply to all registration landfills.

In the end, the Minister of the Environment can override either an approval or a registration. Under section 62, if the Minister is "of the opinion that a proposed activity should not proceed because it is not in the public interest" the Minister may at any time order that no approval or registration be issued in respect of the landfill.

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