News Brief

ENVIRONMENTAL LAW CENTRE

Vol. 16 No. 3 2001
ISSN 1188-2565

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In This Issue

Stakeholder Consultation and the Proposed Meridian Dam[1]

The proposed Meridian Dam is an old idea that has been revisited more than once since it was first proposed in the 1920s. The Meridian Dam would be built on the South Saskatchewan River at the South Saskatchewan Canyon, about 100 kilometers north of Medicine Hat, Alberta. The dam itself would result in a 150 km long reservoir and create significant changes to the natural and aquatic environment. The dam is currently in the pre-feasibility study phase, which is being conducted by Golder Associates Ltd. The goal as outlined in the pre-feasibility study proposal is to give Alberta Environment and Saskatchewan Water a better understanding of technical feasibility, environmental impacts, economic benefits and costs, regulatory requirements and other issues that might affect a decision to undertake the development.

Although public input is not a requirement at this stage, a series of public meetings were conducted in Saskatchewan and Alberta this past summer. Once the study is completed (estimated date is January 2002), the two provincial parties will decide if the project has merit to continue to a full feasibility study. This study reportedly will involve public consultation at various stages of the process.

Legislative approvals, environmental assessment and consultation

Legislative requirements for consultation will not be triggered unless a decision is made that the construction of the dam has merit and the process is continued.

The dam cannot lawfully proceed without the proponents obtaining a number of licences, approvals, dispositions or other statutory authorizations under provincial and federal legislation. Based on information in the pre-feasibility proposal, in Alberta, at minimum, statutory authorization or dispositions must be obtained under the *Water Act*, *Public Lands Act*, *Historical Resources Act*, *Wildlife Act*, *Hydro & Electric Energy Act*, *Forests Act*, *Natural Resources Conservation Act* and the *Wilderness Areas, Ecological Reserves and Natural Areas Act*. In Saskatchewan the proponents must obtain statutory authorization under the *Water Corporation Act* and possibly others. Federally, the proponents must obtain statutory authorization under the *Fisheries Act*, the *Navigable Waters Protection Act*, the *Migratory Birds Convention Act of 1994*, possibly the *National Energy Board Act* as well as obtaining the necessary authorization from the federal government, and in all likelihood the United Kingdom, to flood C.F.B. Suffield military base. Aboriginal interests also must be observed and respected. A number of the legislative statutory authorizations provisions give opportunity for input by the public or at least by directly affected persons.

As well, the project triggers legislative environmental assessment provisions of the Alberta *Environmental Enhancement and Protection Act*, the federal *Canadian Environmental Assessment Act* and possibly the Saskatchewan *Environmental Assessment Act*.

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(Stakeholder Consultation . . . continued from Page 1)

Environmental Law Centre *News Brief*
Volume 16 Number 3 2001

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

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One Year Subscription: $130 + GST
Non-profit Environmental Organizations: $30 + GST

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Although the legislation of each jurisdiction has its own requirements for consultation, it is likely that participating jurisdictions would conduct a joint environmental assessment. This is possible under the *Canada-wide Accord on Environmental Harmonization*, executed between most of the provinces and territories and the federal government in January 1998. The intent of the Accord is to provide a one-window approach to implementing environmental responsibilities by having a single coordinated assessment and review process when more than one jurisdiction is involved.

In addition, the federal government executed a Sub-Agreement on Environmental Assessment with some of the provinces, including Alberta. The intention of this Sub-Agreement is to consider the environmental effects of proposed projects before decisions are made and establish accountability by addressing the roles and responsibilities of the participating governments. *The Canada-Alberta Agreement for Environmental Assessment Cooperation* defines "cooperative environmental assessment" as a single environmental assessment under the terms of the Sub-Agreement, in which all parties cooperate to meet the legal requirements of their respective legislation. When a project in Alberta has the potential to cause significant adverse environmental effects on another province or territory, the Lead Party (as determined under the Agreement) must ensure the potentially affected province or territory is notified and provided an opportunity for involvement in the cooperative assessment.

Saskatchewan and Canada have also executed an Agreement on Environmental Assessment Cooperation with similar provisions to the Canada-Alberta Agreement. In Alberta, the authority of the Agreement begins when a proponent files the provincial public disclosure of documents or a federal project description and cooperative environmental assessment commences. In Saskatchewan, the authority begins when a project proposal as defined in the Environmental Assessment Act is received, or is subject to federal legislation.

The Canada-Alberta Agreement and the Canada-Saskatchewan Agreement outline the consultation aspects of each document. Provisions for participation are to be consistent with the policies and legislation of each province. Since legislative requirements for participation vary under each of the three jurisdictions, it will be interesting to see whether the more encompassing ones are invoked. Given the magnitude of this proposed development, we hope the most inclusive provisions prevail.

It is important that people concerned about this proposed dam keep in contact with Alberta Environment, Saskatchewan Water and the federal authorities. A critical part of stakeholder consultation is to provide a response within the appropriate timeframes, something that is often misunderstood or missed. Delivering a response on time helps ensure that statements are read and considered by the parties involved.

■ **Keri Barringer**
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A version of this article originally was published in Encompass Magazine, fall issue, 2001 as the Environmental Law Centre's EnLaw column.

By Scott Livingstone, *Alberta Environment*

An Alternative Approach to Environmental Regulation

Alberta Environment (AENV) is piloting an alternative regulatory process to encourage facilities to voluntarily commit to environmental performance goals that go beyond regulatory requirements. A draft guidance manual for the Leaders Environmental Approval Document (LEAD) Pilot Program is available on the Department's web site. (http://www3.gov.ab.ca/env/protenf/approvals/)

Under the LEAD program, eligible facilities will develop and commit to environmental performance goals that are directly linked to reducing the environmental effects from their operations and improving environmental quality. Expected goals include emissions reductions, pollution prevention initiatives and the adoption of continuous improvement practices. In exchange for committing to these initiatives, facilities are being offered incentives such as: less prescriptive approval conditions, a streamlined approval amendment process, and consolidated monitoring and reporting requirements. An additional benefit of the program is the opportunity for facilities to gain public recognition through their membership in the LEAD program and for their related environmental achievements.

An important part of the new framework is for meaningful participation by local public and environmental organizations in setting and monitoring performance goals in the facilities LEAD approval. Facilities must share their results openly with government and the interested public. Achievement time frames with verification mechanisms will ensure the process is credible and transparent.

Entrance to the program will be limited to facilities that have demonstrated an exemplary track record in compliance and emissions performance and who have an existing (or are developing) a recognized Environmental Management System (EMS) such as ISO 14001.

The pilot stage of the LEAD program is the product of a study titled An Evaluation of Alternative & Innovative Regulatory Approaches for Environmental Management in Alberta; Kemper 2 & Associates Inc, June 2000, which is posted on the AENV external web site. The study, guided by a tripartite (government-public-industry) advisory committee, researched the effectiveness of various innovative/alternative regulatory programs internationally and surveyed Alberta stakeholders on key innovative ideas to arrive at an alternative framework complementary to the existing Alberta Environment regulatory scheme.

The department is seeking the participation of facilities representing a variety of industrial sectors to pilot the program by testing the effectiveness and utility of program criteria, goals and incentives.

This new direction is a move to enhance the current command and control system to include performance/outcome based elements in the regulatory framework. It is believed that significant gains in compliance and environmental stewardship can be made through incentive based regulatory instruments.

For further information, interested parties can contact George Murphy, Manager, Pollution Prevention, Innovations Division at 427-8472.

In Progress

In the Legislature...

Federal Legislation

As of August 1, 2001, *Regulations Amending the Seeds Regulations* are in force. The amendments pertain to confined field trials and are intended to clarify the responsibilities of those conducting the trials to ensure that plants with novel traits do not become livestock feed or enter any food for humans. The amendments also clarify that those persons responsible for the confined field trial are responsible for the costs of disposal of the plants as well as the costs of all remedial actions required in case there is an accidental release.

As of August 15, 2002 the new *Transportation of Dangerous Goods Regulations* will be in force and the existing ones, dated January 17, 1985, repealed. The new Regulations are published as a Supplement to the *Canada Gazette Part II*, August 15, 2001.

Alberta Regulations and Policy

On June 15, 2001, the Alberta government announced the tightening of emission standards for all new developments or expansion of coal-fired power plants in the province. The new standards are effective immediately through the end of 2005.

Effective August 1, 2001, the *Alberta Energy and Utilities Board Rules of Practice*, AR 101/2001, are in force. The Rules repeal the *Rules of Practice of the Energy Resources Conservation Board* (AR 149/71), the *Rules of Practice*, (AR 602/57), and the *Local Intervener's Costs Regulation* (AR 517/82.)

The Alberta Energy and Utilities Board has also brought into effect two new intervener funding guides, *Guide 31A: Guidelines for Energy Cost Claims*, and *Guide 31B: Guidelines for Utility Cost Claims*. These are effective August 1, 2001 and supercede the previous *Guide 31* and the previous *Scale of Costs*.

Cases and Enforcement Action. . .

A Supreme Court of Canada decision released June 28, 2001 in *114957 Canada Ltée (Spraytech, Société d'arrosage)* v. *Hudson (Town)* confirmed the municipality was acting within its authority when it created a bylaw restricting the use of pesticides within its perimeter. The appeal was dismissed. *See* Case Notes, *Municipal Regulation of Pesticide Use*, this issue.

Alberta Environment issued an Environmental Protection Order to Imperial Oil Limited and Devon Estates Limited, both of Calgary, related to soil contamination in the Lynnview Ridge area of Calgary. Imperial Oil Limited owned and operated a petroleum refinery and petroleum storage tank farm on the site. The site was transferred to a subsidiary company, Devon Estates Limited, who entered into a joint venture agreement to develop it into a subdivision. The Order requires the parties to submit a complete assessment of the site and options for remediating it. Once the remediation plan is approved by Alberta Environment, the parties will be responsible for implementing it according to an approved schedule. The Order was issued under s.102(1) of the *Environmental Protection and Enhancement Act*. Both companies have filed an appeal with the Environmental Appeal Board.

The Alberta Environmental Appeal Board released a decision on prelminary matters in *Intervenor Requests: Schafer et al.* v. *Director, Prairie Region, Natural Resources Service, Alberta Environment, re: B and J Schneider Ranching*. This decision pertains to 18 requests to participate in a hearing into the issuing of a Preliminary Certificate and proposed Licence under the *Water Act*. The Board denied intervenor status to all except one who is allowed to make a written submission only. The Board noted the other proposed interveners held substantially the same position and would "not materially assist the Board in deciding these appeals."

An Alberta Provincial Court Judge sentenced Universe Machine Corporation of Edmonton to a $25,000 fine on August 21, 2001 after the company plead guilty to improperly storing hazardous material from their machine shop. The company had no secondary containment as required by the *Waste Control Regulation*.

A Federal Court Judge granted an interim injunction preventing tree clearing and road construction on the 118 kilometre road through Wood Buffalo National Park until the action launched by the Canadian Parks and Wilderness Society and the Sierra Legal Defence Fund is heard in court. The Sierra Legal Defence Fund will be presenting arguments against the road on September 27, 2001 in Vancouver.

■ **Cindy Chiasson**, *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.

Case Notes

The Federal Court of Appeal on Scoping *Project* and *Assessment* and on Public Interest Costs

Bow Valley Naturalists Society and Banff Environmental Action and Research Society v. Minister of Canadian Heritage, Canadian Pacific Hotels Corporation et al.[1]

Background

In September 1996, Canadian Pacific Hotels (CP) put forward a proposal to Parks Canada to develop a new meeting facility at the Chateau Lake Louise in Banff National Park. The proposal constituted a project under the federal *Canadian Environmental Assessment Act* (CEAA) that triggered an environmental assessment. Parks Canada was the responsible authority (RA) under CEAA and was therefore charged with the responsibility to determining adequacy of the assessment. CP's long range plan included a number of other components including a recreation area, staff housing, additions to a parkade and a room conversion. CP conducted the required screening assessment document under the CEAA. CP retained a consultant to review the screening and to conduct public consultation. In response to identified concerns, CP submitted additional screening documents. The RA reviewed the screening documents and concluded that the project was not likely to have a significant environmental impact provided that mitigation measures were implemented [9]. Consequently, the RA issued approval for the meeting facility. The appellants sought judicial review of the RA's decision. The Federal Court Trial Division concluded there was no basis for it to interfere with the RA's decision. The appellants appealed to the Federal Court of Appeal.

Analysis

Three issues

The appellants argued that the RA's approval of the project did not comply with CEAA. The appellants arguments focussed on sections 15 and 16 of the Act. Under section 15 the RA determines the scope of the project and consequently, scope of environmental assessment. Under section 16 the RA determines the scope of factors to be determined in the assessment. The court examined three issues in analyzing the arguments: standard of review, scoping of project and cumulative effects.

Standard of review

The appellants argued that the correct standard of review for decisions under both 15 and 16 is correctness. The respondents argued the appropriate standard was reasonableness. Under the correctness standard the court has considerable leeway to review a decision since it may determine whether or not it is correct. Under the reasonableness standard, a court can interfere with a statutory delegate's decision only if it is patently unreasonable. Relying on past decisions, the court found the standard of review for matters involving statutory interpretation to be correctness, and the standard of review for matters involving an exercise of discretion to be reasonableness.

Scoping of project

The RA scoped the project as the meeting facility only and the appellants argued that the scoping was too narrow. The court found the RA's authority under section 15 to be a discretionary one and that the RA's exercise of discretion was reasonable. Accordingly, it would not interfere with the RA's decision.

Cumulative effects

Section 16(1)(a) of CEAA requires an assessment of any cumulative effects. CP's cumulative effects document addressed infrastructure, including water supply and use, waste water disposal, electrical power, solid waste disposal, traffic, transportation and parking, human use and ecological integrity, visitor experience and community life [66]. Relying on this document, the RA found cumulative effects to be not likely significant. The appellants argued that the assessment failed to meet the requirements of 16(1(a) since it did not take into account other future projects that may impact the environs. The court disagreed. It stated:

> ... even though the decision and its reasons leave much to be desired, and even though they are often untidy, confusing and lacking in specificity, I cannot conclude that the cumulative effects aspect of the decision of Parks Canada being judicially reviewed was unreasonable or that the Trial Judge erred in this regard. It is not necessary for the decision to be a model of legal analysis. Nor is it required, in order to comply with the Act, to consider fanciful projects by imagined parties producing purely hypothetical effects [32].

Disposition and costs

Based on its analysis, the Court dismissed the appeal. The disconcerting aspect of this decision is that the court dismissed the appeal with costs.[2] The court stated "While the fact that the litigants purport to act in the public interest is a factor to be considered in exercising our discretion as to costs, it is only one factor. The appellants' case was largely based on arguments with no factual foundation and this factor weighs against granting the appellants relief from costs" [79]. With due respect, we disagree with the cost award. The object of judicial review is to invoke judicial power to prevent statutory delegates from violating laws by either failing to carry them out, or by failing to carry them out in a reasonable manner. The risk of having to pay costs can have a serious chilling effect on public interest advocates who might otherwise provide the public service of having violations being brought before the court. In our view, unless a public interest's advocates appeal is frivolous and vexatious, or clearly without merit, neither claimed to be the case by the court in this appeal, courts should not award costs against those who volunteer their time and resources to support and promote the public interest.

■ **Arlene Kwasniak**
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1. Decision number A-642-99, 1-10-2001, Federal Court of Appeal. References in brackets are to paragraphs of decision.
2. A representative of one of the appellants advised us that Parks Canada stated that it would not seek costs.

Case Notes

Drawing a Fine Line: The Adjudication of "Directly Affected"

Metis Nation of Alberta Zone II Regional Council v. *Director, Bow Region, Environmental Service, Alberta Environment* re: *AEC Pipelines Ltd.*, (20 March 2001) 00-073 (EAB)

One of the key concepts governing public participation in both the approvals and appeals processes under the *Environmental Protection and Enhancement Act* (EPEA) is that of the "directly affected" person.[1] Those who are directly affected by an application for an approval may submit their views and concerns to Alberta Environment by means of a statement of concern.[2] When an approval is issued, those who have a right to appeal the approval include persons who previously submitted statements of concern and are directly affected by the decision to issue the approval.[3] Indeed, the question of a party's status as a "directly affected" person is often one of the first issues dealt with by the Environmental Appeal Board (EAB) in dealing with an appeal.

Background

In this case, the EAB addressed the interrelationship between the approval and appeal processes under EPEA, focusing on the "directly affected" concept. The appellant had submitted a statement of concern to the Director related to an application for a pipeline approval. The Director first asked for further information and subsequently indicated that he would not accept the statement of concern on the basis that the appellant was not directly affected. The appellant sought to appeal that decision to the EAB. Over the course of its dealings with the EAB, the appellant learned that the Director had issued an approval for the pipeline in question and then filed a second appeal with the EAB in relation to the approval.

Decision

A focal point of this appeal was whether the EAB had jurisdiction to deal with the issue of the Director's rejection of the appellant's statement of concern. Relying on a previous Court of Queen's Bench decision on the scope of its jurisdiction[4], the EAB found that it must be able to review any of the related procedural decisions made by the Director in issuing an appeal. The EAB found that it did not have jurisdiction to hear an appeal based solely on the Director's decision to accept or reject a statement of concern. However, it went on to hold that it could review the Director's decision to accept or reject a statement of concern as part of an appeal based on one of the grounds set out in s.84(1) EPEA, given that in those circumstances it would have jurisdiction to review various elements of the approval process as part of the whole appeal.[5]

Practical Effects

Ultimately, this case may have the effect of rendering Directors' decisions on whether parties submitting statements of concern are directly affected somewhat moot. While a Director's decision on this point is not itself appealable, the opportunity remains for a party who has been deemed by the Director not to be directly affected to appeal based on one of the grounds set out in s.84(1) EPEA and have the EAB deal with the issue of its "directly affected" status. This saves such a party the time and cost of having to bring an application for judicial review of the Director's determination on the statement of concern in order to preserve the possibility of appealing the Director's ultimate decision on the approval.

Given that this case appears to protect a party's ultimate ability to commence an appeal, the main practical effect may be to make public participation in the approvals and appeals processes more difficult. The Director is not obligated to provide notice of approvals to parties whose statements of concern have been rejected, which makes it more difficult for these parties given that the appeal period to the EAB begins running upon notice of the issuance of an approval. In this case, the EAB was willing to calculate the appeal period based upon when the appellant had received actual notice of the approval, rather than basing it on the timing of issuance of the approval. However, it is speculative to believe that the EAB would take this position in all appeals before it.

Policy considerations

The most troubling aspect of this case is the apparent policy shift by Alberta Environment to a practice that will have the effect of impeding public participation in the regulatory processes. Alberta Environment's past practice in dealing with statements of concern had been to generally accept and consider all concerns submitted to the Director before making a decision on an application for approval, leaving the issue of a party's "directly affected" status to be determined by the EAB if necessary. In fact, Alberta Environment had a written policy on this matter indicating that it wished to encourage public participation in regulatory activities and that acceptance of statements of concern should err on the side of inclusivity.[6]

The only significant impact that a policy of inclusivity would have on the Director relates to the obligation imposed under EPEA to provide notice of decisions to issue or refuse to issue approvals.[7] There could be applications that attract many statements of concern, thus obliging the Director to provide notice to all those who submitted if a policy of inclusivity were followed. Otherwise, the Act and its related regulations do not impose any substantive obligations on the Director to take particular actions based on the content of statements of concerns. In fact, there is no statutory requirement for the Director to even consider the content of statements of concern in making a decision on an application for approval.

(Continued on Page 9)

Case Notes

Municipal Regulation of Pesticide Use

114957 Canada Ltée (Spraytech, Société d'arrosage and Services des sepaces verts Ltée/Chemlawn v. Town of Hudson[1]

Introduction

In 1991 the Town of Hudson, Quebec, located just outside Montreal, enacted a bylaw restricting the use of pesticides within the municipality. The bylaw responded to ongoing concerns raised by members of the community about the safety and adverse effects associated with pesticide use. The bylaw allowed limited use of pesticides, but essentially banned their aesthetic use for landscaping and lawn care. The municipality charged the appellants, two landscaping companies, with contravention of the bylaw for using pesticides for unpermitted uses in 1992. The appellants plead not guilty and asked the court to declare the bylaw to be inoperative and *ultra vires* the Town's authority. The Quebec Superior Court denied the motion for a declaratory judgement and the Quebec Court of Appeal affirmed this ruling. The appellants appealed to the Supreme Court of Canada. In June, the Supreme Court handed down its unanimous decision. It upheld the trial and appellate determination that the bylaw was valid. This important decision gives municipalities guidance on how they may legitimately use municipal powers to protect health and environment.

The challenge and the Supreme Court's response

The Town of Hudson passed the bylaw under section 410 of Quebec's enabling municipal legislation, the *Cities and Towns Act*[2]. The appellants argued that the bylaw was invalid and *ultra vires*, on the grounds that it was not authorized under provincial legislation, it was prohibitory and discriminating and it conflicted with federal and provincial laws.

Provincial authority to pass bylaw

A municipality is a delegated authority, created by the provincial legislature, and receives its law making powers from the province. Accordingly, if a local government body validly exercises a power, a grant of authority must be found somewhere in the provincial laws. The appellants argued that the province did not delegate power to regulate the use of pesticides to municipalities.

In the Hudson case, the Court broadly interpreted municipal powers under the *Cities and Towns Act*. LeBel J. explained that the "... Town of Hudson passed the pesticide restriction bylaw under section 410 of the *Cities and Towns Act*. The section enables municipal councils to make bylaws for the "peace, order, good government, health and general welfare in the territory of the municipality"". She noted that "More open-ended or "omnibus" provisions such as s.410 allow municipalities to respond expeditiously to new challenges facing local communities, without requiring amendment of the provincial enabling legislation" [19]. However, such general grants of power normally supplement more specific grants. In the Hudson case, there was no specific grant of power, such as a power relating to pesticide use within the municipality.

The issue for the Court, therefore, was whether a general welfare provision such as s.410, absent a specific grant, could authorize bylaw 470 [52].

The Court found that omnibus provisions can authorize bylaws that fall outside of any specific grant of powers within certain limitations. In the Court's words:

> It appears to be sound legislative and administrative policy, under such provisions, to grant local governments a residual authority to deal with the unforeseen or changing circumstances, and to address emerging or changing issues concerning the welfare of the local community living within their territory. Nevertheless, such a provision cannot be construed as an open and unlimited grant of provincial powers. It is not enough that a particular issue has become a pressing concern in the opinion of a local community. This concern must relate to problems that engage the community as a local entity, not a member of the broader polity. It must be closely related to the immediate interests of the community within the territorial limits defined by the legislature in a matter where local governments may usefully intervene [53].

The Court found the Hudson bylaw within the ambit of normal local government activities since it concerned the use and protection of the local environment within the community [54].

Precautionary principle

In concluding its discussion on statutory authority the Court noted that reading section 410 to permit the Town to regulate pesticide use is consistent with and respects the precautionary principle, a dominant principle in international law and policy. This principle provides that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation" [3][31]. It is significant that the Supreme Court's sees this principle as an aid to statutory interpretation.

Prohibitory and discriminating?

The Court rejected the appellant's claim that the bylaw violated the principle of delegated legislation in that it was prohibitory and discriminated without authorization by enabling legislation. Although the bylaw made a general prohibition and then allowed some specific uses, the Court did not find that it was a purely prohibitory instrument. Regarding discrimination, the Court noted that there can be no regulation on a topic without some form of discrimination and concluded that an "... implied authority to discriminate was then unavoidably part of the delegated regulatory power" [55].

(Continued on Page 10)

Indigenous Peoples & Forest Stewardship Council (FSC) Certification

As noted in the last issue of News Brief, the Environmental Law Centre is taking steps to better deliver its public programs to aboriginal communities, among others. As part of this effort, the Centre will strive to see that each issue of News Brief contains material that should be of interest to aboriginal communities and their representatives.

Introduction

On August 17 and 18 over 200 people from across Canada attended a joint National Aboriginal Forestry Association (NAFA) & Forest Stewardship Council (FSC) conference in Ottawa. The conference provided an opportunity for Indigenous Peoples and organizations to provide input into the development of a national standards process for boreal forests. Conference proceedings and related materials can be found on the FSC's web site.[1]

Background

Forest certification schemes arose in response to widespread destruction of logging of old-growth forests around the world. Their role is to conserve biodiversity and ensure ecologically and socially responsible forest use. An effective and credible forest certification scheme permits consumers to distinguish between different products and to choose to support well-managed forest via their purchasing decisions. There are a number of forest certification schemes in Canada, including the Forest Stewardship Council (FSC), the ISO 14001 Environmental Management System Standard (ISO), the Sustainable Forestry Initiative (SFI), and the Canadian Standards Association's Sustainable Forest Management Standard (CSA). Many commentators agree that FSC certification is best suited to achieving the above stated goals. For example, a report by the environmental organization "Fern" states that "The conclusion of our analysis is clear: the Forest Stewardship Council is currently the only independent and credible certification scheme in the market".[2]

FSC Certification

The FSC is an international non-profit organization founded to support environmentally appropriate, socially beneficial, and economically viable management of the world's forests[3]. Internationally, FSC members are divided into three chambers - environmental, social and economic. In Canada there is a fourth, the indigenous peoples' chamber.

The FSC accomplishes its goals by accrediting "certifiers" to assess forestry operations against a set of standards based on the FSC "Principles" and "Criteria" for forest stewardship. The FSC uses the market to achieve its goals. Operations that meet the standards can use the FSC logo on their products. Because of market pressures, many buyers of forest products are phasing out products made from old-growth forests and are giving preference to FSC certified products.

FSC requirements are based on a set of ten "Principles", one of which is "Indigenous Peoples' Rights"[4]. Each Principle has a number of "Criteria". These Principles and Criteria can be further elaborated in regional standards.

The Conference

The conference was named "Indigenous Peoples and FSC Certification: Application of Principal 3, Indigenous Rights & Input into the Design of a National Boreal Standards Process." Principle 3 states that "The legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources shall be recognized and respected"[5]. Key issues addressed included: the role of government in resolving larger political issues and addressing Indigenous Peoples' interests in lands and resources, the providing of direction to forest companies seeking certification about how to work with Indigenous communities, how Indigenous communities will be involved in the development and maintenance of parks and protected areas, and guidelines for conducting cultural research which documents Indigenous land use.

On day one speakers discussed forest certification concepts in general, and provided an overview of FSC in Canada, the United States, and internationally. John Snobelen, Ontario Minister of Natural Resources, gave the keynote address. A highlight was lawyer Mark Stevenson's presentation in which he discussed the legal implications and interpretation of Principle 3. Mr. Stevenson noted that the process of setting regional standards should reflect the fact that Principle 3 requires a higher standard than domestic law because it requires forest managers to ensure that Aboriginal rights are being met.

Day two concerned designing a national boreal standards process. Ovide Mercredi, Special Advisor to the National Chief, Assembly of First Nations, gave the keynote address. He noted that Certification is one way to recognize and support the rights of Indigenous Peoples, and that the FSC is forward thinking. It was his contention that the relationship between labour and First Nations needs to be enhanced. He believed that the issues inherent in the voluntary nature of FSC could be overcome if industry embraces the initiative. On the negative side, Mr. Mercredi noted that one disadvantage of the FSC initiative is that it does not deal with past mismanagement of resources nor does it address issues of compensation for lost revenues.

Future directions include the preparation of a Strategic Direction Paper by a "working-group". The paper will discuss the direction the FSC should take in applying and promoting Indigenous Peoples' rights plus provide recommendations.

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Environmental Law Centre

1 www.fsccanada.org
2 "Behind the Logo: an Environmental and Social Assessment of Forestry Certification Schemes, Summary", May 2001. The full report, "Behind the Logo", is available from FERN at: www.fern.org.
3 See Jessica Clogg, "FSC Certification Primer", *News from West Coast Environmental Law*, Vol. 26:05, March 2, 2001.
4 Ibid.
5 Ibid

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Michael Callihoo
Thomas Dickson
Linda Duncan
Emery Jamieson
William Fuller
Mary Griffiths
Thomasine Irwin
J. Derek Johnson
Komex International Ltd.
Frank Liszczak
John Paul Mimeault
Kim Sanderson
United Way of Calgary – Donor Choice Program

(Drawing a Fine Line: The Adjudication of "Directly Affected"... Continued from Page 6)

In light of the stated purposes of EPEA, which include public participation in environmental protection, public policy reasons in support of a more restrictive approach to accepting statements of concern are not readily apparent. Alberta Environment should pursue its stated 1997 policy of erring on the side of inclusivity by accepting all concerns offered and leave the actual determination of "directly affected" status to the EAB.

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

1. S.A. 1992, c.E-13.3.
2. *Ibid.*, s.70.
3. *Ibid.*, s.84(1).
4. *Alberta (Director, Environmental Service, Prairie Region) v. Alberta (Environmental Appeal Board)* (2000) 33 CELR (NS) 258 (Alta. Q.B.)
5. *Metis Nation of Alberta Zone II Regional Council v. Director, Bow Region, Environmental Service, Alberta Environment re: AEC Pipelines Ltd.*, (20 March 2001) 00-073 (EAB) at 10.
6. Alberta Environmental Protection memorandum from A.R. Schulz, Assistant Deputy Minister, December 1, 1997, Subject: Service Policy on Acceptance of Statements of Concern.
7. *Supra* note 1, ss.71(1)(e) and 71(3).

Environmental Law Centre New Publication

Alberta's Wetlands: A Law and Policy Guide

by Arlene Kwasniak
Price: $29.95 + GST.

This publication contains over 200 pages of information on laws, policies and regulatory processes that can affect Alberta's wetlands. The Guide contains seven law primers and thirteen detailed chapters, including on riparian rights, bed and shores, water regulation, environmental assessment, federal interests through fisheries, navigation and migratory birds, municipal controls, resource development and protective mechanisms. This Guide is aimed at *wetland managers,* meaning anyone with an interest in the continuing existence of wetlands.

To order, contact the Environmental Law Centre by:
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Mail or in person: 204, 10709 Jasper Avenue, Edmonton, AB T5J 3N3.
Website: www.elc.ab.ca

(Municipal Regulation of Pesticide Use. . . continued from Page 7)

Conflict with federal or provincial laws?

Federal regulation of pesticides is under the *Pest Control Products Act* [4]. This law deals with the registration of pesticides for use in Canada, and the manufacture of pesticides in Canada. Provincial regulation is under Quebec's *Pesticides Act* [5]. This law establishes a regulatory scheme for vendor and commercial applicator licenses and permits. In determining whether the bylaw conflicted with either the federal or provincial regime, the Court applied the *impossibility of dual compliance test.* This test was set out in the case of *Multiple Access Ltd.* v. *McCutcheon* [6]. That case explored the validity of provincial and federal laws on the same matter. The court found that where two levels of legislation exist on the same topic, but it is possible to follow both laws, then there is no conflict requiring one of the laws to be struck down as invalid. A conflict only arises where following one law requires non-compliance with the other. In applying this test, the Supreme Court noted that the federal and provincial legislation fail to differentiate between 'cosmetic' and 'necessary' uses of chemical controls, and in this absence municipalities should be able to respond to local concerns. Further, the federal and provincial legislation did not take into account regional differences, community needs, and risk assessment regarding when and where pesticides may be applied. In the end, the Supreme Court found that since it was possible to mutually comply with the federal law, the provincial law and the bylaw, there was no conflict.

Application to Alberta

The Supreme Court specifically cited sections 3(c) and 7 of the Alberta *Municipal Government* Act as being analogous to section 410 of Quebec's *Cities and Towns Act* [19]. Section 3(c) is an omnibus provision stating that a purpose of an Alberta municipality is to "develop and maintain safe and viable commmunities". Section 7 sets out general jurisdiction to pass bylaws, including respecting the "safety, health and welfare of people and the protection of people and property" amoung others. By specifically mentioning the Alberta legislation (along with other provinces municipal enabling legislation) the Supreme Court makes it clear that the Hudson case has application outside of Quebec. This should give Alberta municipalities the green light to enact bylaws that regulate many health, welfare, safety and environmental matters. Municipalities must be careful , however, that their proposed bylaws fit within the legislative purposes for municipalities, or within other bylaw making authority, are not prohibitory nor discriminatory and do not conflict with provincial or federal laws.

■ **Arlene Kwasniak**
Executive Director
■ **Alison Peel**
Summer Legal Researcher
Environmental Law Centre

1 File No. 26937, 12-7-2001; 6-28-2002, Supreme Court of Canada. References in brackets are to paragraphs of decision.
2 *Cities and Towns Act*, R.S.Q., c. C-19
3 From para. 7 of the *Bergen Ministerial Declaration on Sustainable Development* (1990)
4 *Pest Control Products Act*, R.S.C. 1985, c. P-9
5 *Pesticides Act*, R.S.Q., c. P-9.3
6 *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161

Administrative Penalties

The following administrative penalties over $5,000 were issued under the *Environmental Protection and Enhancement Act* since the last issue of *News Brief*:

- $8,500 to the Town of Okotoks for exceeding the total and faecal coliform limits specified in the Approval to operate its class II wastewater treatment plant, failing to include all the required information in its monthly reports, and failing to immediately report contravention of the Approval. The penalty was assessed under s.213(e) of the *Environmental Protection and Enhancement Act*.
- $10,000 to Syncrude Canada Ltd., operaters of the Mildred Lake oil sands processing plant and mine, for three contraventions of emitting particulates in excess of the levels authorized by their Approval and for one contravention of failing to immediately reduce the excessive emissions. The penalty was assessed under s.213(e) of the *Environmental Protection and Enhancement Act*.
- $18,000. to Air Liquide Canada Inc. operating in Strathcona county for contravening their Approval by failing to monitor a Daily Composite sample of the Gray Water Sump, exceeding various limits related to the sump, late submission of required reports, and failing to immediately report the contravention of their Approval. The penalty was assessed under s.213(e) of the *Environmental Protection and Enhancement Act*.

The following administrative penalties over $400 were issued under the *Public Lands Act* and *Forests Act* since the last issue of *News Brief*:

- $500. to Lazy H Trail Co. of Cochrane for contravening terms and conditions of their lease contrary to s.47.1 of the *Public Lands Act*.
- $500. to Double Z Forest Products Ltd. of Hines Creek for unauthorized timber harvest and contravening terms and conditions of their annual operating plan contrary to s.10 of the *Forests Act* and s.100(a) of the *Timber Management Regulation*.
- $500. to McPhee Construction Ltd. of Edson for contravening terms and conditions of their lease in violation of s.47.1 of the *Public Lands Act*.
- $500. to Karl Schmieder of Mayerthorpe for contravening terms and conditions of a timber permit in violation of s.100(b) of the *Timber Management Regulation*
- $800. to Neal Flower of Whitecourt for contravening terms and conditions of the annual operating plan in violation of s.100(a) of the *Timber Management Regulation*.
- $922.50 to Norman Rusnak of Edson for unauthorized use of public land contrary to s.47(1) of the *Public Lands Act*.
- $2,837.50 to Equatorial Energy Inc. of Calgary for unauthorized use of public land in violation of s.47(1) of the *Public Lands Act*.

By *Environment Canada, Pollution Enforcement Division*

Federal Alternative Enforcement Mechanism

Introduction

At one time, enforcement of laws relating to environment mainly proceeded by way of prosecution. Now environmental laws often provide for an array of additional enforcement mechanisms such as fines or administrative penalties, government enforcement orders, and statutorily authorized court injunctions and other orders. It is important for regulated industries, their representatives and those acting on behalf of the public interest are informed of the many mechanisms that our governments may use to enforce laws. This *Practical Stuff* provides information on a new alternative measure that the federal government is using to enforce key federal environmental laws and regulations. Environment Canada, Pollution Enforcement Division, Prairie and Northern Region kindly provided the report set out below on these alternative measures.

Environmental Protection Alternative Measures: An Overview

The *Canadian Environmental Protection Act, 1999* (CEPA, 1999) recognizes the need for an enforcement mechanism for environmental offences where criminal prosecution may not be fully effective in protecting the environment and ensuring continued compliance with the law.

CEPA, 1999 introduces a new enforcement option – "environmental protection alternative measures" (EPAM). The Act defines these as measures, other than judicial proceedings, that are used to deal with a person who is alleged to have committed an offence under the Act. These measures are available as a response to many, but not all, offences under CEPA, 1999.

EPAMs are a means of "diverting" an alleged offender away from the criminal justice system *after* the alleged offender has been charged. The EPAM provisions of the Act thus offer additional discretionary measures and a novel means of enforcing environmental law, drawing on similar schemes that exist under the *Young Offenders Act* and the *Criminal Code*.

EPAMs can contribute to pollution prevention by allowing the Attorney General of Canada (who, through federal Crown prosecutors,[1] negotiates the agreement for the federal government) and the alleged offender to identify and negotiate a solution to correct the problems caused by the alleged violation of the law. EPAMs can also help ensure that offending behaviour does not recur. Environment Canada will consider recommending to prosecutors that they use an EPAM, rather than criminal prosecution, where an EPAM is consistent with the principles of CEPA, 1999.

EPAM agreements can cover issues such as the alleged offender's commitment to establish better monitoring mechanisms and to improve quality control measures, or to implement a strategy for changing a production process to reduce the possibility of future offences. An EPAM agreement can also specify the remedial measures that the alleged offender will employ to clean up environmental damage resulting from a violation of CEPA, 1999 or the restitution the alleged offender will offer. An agreement can include a timeframe for the alleged offender to satisfy the agreement, the requirement to file progress reports, and a list of specific consequences for failure to respect the agreement.

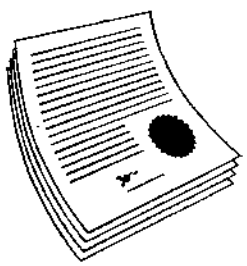
An EPAM agreement therefore allows Environment Canada to use a legally binding agreement to divert a case from the traditional criminal process. It also gives the alleged offender an opportunity to participate in developing appropriate solutions. With this approach, both parties avoid the expense and delays involved in prosecution. If negotiations break down or prove unsatisfactory, the prosecutor will proceed with the prosecution.

EPAM agreements are negotiated between an alleged offender (or legal representative) and the prosecutor or someone selected by the prosecutor and the regional manager of enforcement. The negotiator or negotiation team consults with officials from Environment Canada about the appropriate terms for the agreement.[2] These agreements can last up to three years.[3]

1 Several provisions of *CEPA, 1999* refer to rights and responsibilities of the Attorney General of Canada. Section 295 defines "Attorney General" to mean the Attorney General of Canada or an agent of the Attorney General of Canada. In practice, Crown prosecutors act on behalf of the Attorney General. References in these guidelines to "prosecutors" or "Crown prosecutors" mean federal prosecutors who are acting as agents for the Attorney General of Canada.

2 Section 300(1).

3 Section 299.



Ask Staff Counsel

Granting Conservation Easements to Yourself

Dear Staff Counsel:
I work for an Alberta land trust that is a qualified organization that can be a grantee of a conservation easement under the *Environmental Protection and Enhancement Act* (EPEA). I'll call it "Cripple Creek Conservancy" (CCC). CCC owns a parcel of land that it wants to sell. The land is full of birds, and at night, there are bats, till the morning comes. CCC wants to grant a conservation easement on the property prior to the sale to protect the land's natural values. It would be convenient for CCC just to grant a conservation easement to itself prior to the sale. My question is, can a qualified organization be both the grantor and the grantee of a conservation easement? Is it hard to make arrangements with yourself?

Sincerely, N. Young

Dear N:
Unfortunately, a transaction where a qualified organization under the EPEA acts as both grantor and grantee in respect of a conservation easement is in all likelihood invalid at law, and could be set aside by a court. I'll tell you why. It is well established at common law that a person cannot make a contract with him or herself and if such a contract is made, it is void. This common law principle on common contractual parties applies to a conveyance of property to oneself. The prohibition even has been found to apply where the transferor and transferee, although the same person, acted in different capacities. A report by the Institute of Law Research and Reform for Alberta titled "Common Promisor and Promisee Conveyances with a Common Party" (Report No. 11 October 1972) further explains the common law doctrines.

Common law may be altered by legislation, however the legislation must explicitly or by necessary implication require the alteration. Indeed, as a result of the mentioned Institute report, changes were made to Alberta law to deem valid certain common party conveyances. These changes include transactions set out in the *Common Parties Contracts and Conveyances Act*, (now *Law of Property Act*) and amendments to the *Land Titles Act*. The provisions in the *Law of Property Act* allow a number of the common party conveyances, such as a transfer of property from two persons to one of the persons, but it does not validate a conveyance of property by one single party to that same single party. Sections 71and 72 of the *Land Titles Act* enable an owner of land to validly grant a restrictive covenant or common law easement for the benefit of other land that he or she owns. Section 119 allows executors, administrators or trustees to make valid transfers to themselves in their personal capacity.

Conservation easements are interests in land and so the common law principle prohibiting common party conveyances applies unless legislation expressly or by necessary implication alters the application of this principle in respect of conservation easements. There is no language in EPEA or other legislation that we know of that explicitly or by necessary implication allows a qualified organization to grant a conservation easement to itself. Accordingly, the common law prohibition applies and such a transaction should be void. Since conservation easements under EPEA are purely statutory creations, we do not feel that the provisions of the *Land Titles Act* validating grants of common law easements or restrictive covenants apply.

Nevertheless, don't let it bring you down. There are a few possibilities that could enable CCC to accomplish what it intends. If CCC owns a parcel separate from the one it wants to transfer, it might be possible to use a restrictive covenant to limit uses instead of a conservation easement. However, CCC must be sure that the common law conditions for placing a valid restrictive covenant exist. Another would be using a cooperating intermediate party to act as first transferee of the parcel. After the transfer, that party would grant a conservation easement to CCC. Then that party would transfer the parcel as originally intended. These arrangements would have to be very carefully structured and all potential tax consequences taken into account. Or, CCC and the intended purchaser might structure the sale transaction so that the conservation easement is placed on title immediately following the transfer. This probably could be done by way of solicitor trust conditions. The parties, however, should be aware of potential tax consequences since the conservation easement might lower the value of land following the transfer, but not before it.

As a closing note, as a result of your request and our research, we have written to the Government of Alberta calling for an amendment to the *Environmental Protection and Enhancement Act* to specifically enable a qualified organization to act as both grantor and grantee.

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