News Brief
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Direction Needed for Regulatory Remediation of Contamination

In This Issue

Remediation of contaminated land often is preceded by disputes about the scope of liability for that remediation. Where Alberta Environment has acted to compel site remediation, such disputes have generally manifested themselves as concerns regarding the choice of regulatory tools and responsible parties. Recent decisions have given some guidance in this area, but are unlikely to be of great precedential value in the future. Clear direction is needed, preferably from Alberta Environment as the regulator.

Regulatory tools

Under the *Environmental Protection and Enhancement Act* [1] (EPEA), there are two obvious tools available to Alberta Environment to require remediation of contamination. The most commonly used option is an environmental protection order issued under section 113 EPEA to deal with substance releases into the environment (a "substance release EPO"). This type of order gives the Director, an Alberta Environment official, the ability to require any of a wide range of "persons responsible" for a released substance to take various actions to prevent, assess and remediate releases into the environment.[2]

Another tool that can be used by Alberta Environment to require remediation is an environmental protection order issued under section 129 EPEA to deal with remediation of designated contaminated sites (a "contaminated sites EPO"). To issue such an order, a Director must first designate property as a contaminated site in accordance with the provisions of Part 5, Division 2 EPEA.

The contaminated sites EPO requires a more formalized and lengthy process than the substance release EPO, but also offers the possibility of a broader range of "persons responsible" to whom an EPO may be issued.[3]

Practical context

In the nine years since EPEA came into force, the substance release EPO has been Alberta Environment's preferred tool for requiring remediation of contamination. Over that time period, the Department has issued approximately 100 substance release EPOs, but has not issued any contaminated sites EPOs and has designated four contaminated sites under Part 5, Division 2 EPEA.[4] The contaminated sites provisions allow for their retrospective application,[5] while such retrospectivity is not explicitly provided for in the substance release provisions set out in Part 5, Division 1 EPEA.

Uncertainty re: option selection

Much of the jurisprudence dealing with the applicability of substance release EPOs to remediation of contamination has come about due to the lack of clear criteria in EPEA with respect to the use of these orders and contaminated sites EPOs. The Environmental Appeal Board (EAB) has recently dealt with two appeals seeking to overturn substance release EPOs and have those orders replaced with contaminated sites EPOs.[6] In both instances, the Director issued substance release EPOs to require remediation of longstanding contamination, while the appellants argued that contaminated sites EPOs should have been issued instead.

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The EAB has remarked on both the lack of direct guidance in EPEA with respect to choices between substance release EPOs and contaminated sites EPOs and the lack of any apparent legislative intent on this matter.[7] In dealing with this dilemma, the EAB has found that the Director has a "legal discretion" to issue a substance release EPO to deal with contamination, with an ability to later convert such an order to a contaminated sites EPO in appropriate circumstances.[8] Unfortunately, little guidance is provided to indicate what might be considered to be "appropriate circumstances". The EAB has also expressed concern over Alberta Environment's strong preference for use of the substance release EPO, fearing that the contaminated sites provisions of EPEA may be rendered meaningless.[9] Effectively, this is the current state of regulatory affairs and it is likely to continue without express legislative criteria for guidance.

Potential criteria

Currently, there are very limited criteria, mainly policy-based, that could provide guidance in deciding between the use of a substance release EPO or a contaminated sites EPO to require remediation. As mentioned previously, the primary precondition for use of a contaminated sites EPO is the designation of property as a contaminated site under EPEA. This requires the presence on a property of a substance that "may cause, is causing or has caused a significant adverse effect".[10] The lack of a definition of "significant adverse effect" leaves the Director with broad discretion in designation of contaminated sites.

A provincial guideline indicates that designation of a contaminated site will usually be a "last resort" tool to be used where no other tools are appropriate.[11] It discusses some limited criteria that may be used by the Director in deciding whether to designate a contaminated site. These include the need to restrict use of contaminated property or products from that property, and liability considerations such as a large number of potentially responsible persons, orphan shares or provincial government liability.[12] Unfortunately, the guideline does not specifically discuss the applicability of substance release EPOs to remediation of contamination.

The EAB decisions referred to above also do not provide much guidance on this matter. In particular, it appears that potential retrospective application of a substance release EPO does not have great relevance, as the decision regarding retrospectivity will always be made on the particular circumstances of the situation. As well, in most instances, contamination will be regarded as an "ongoing pollution problem" with sufficient elements of prospectivity to override the general presumption against retrospectivity.[13]

In 1994, a multi-stakeholder advisory committee made a number of recommendations to the Minister of Environment on the implementation of EPEA's contaminated sites provisions.[14] These recommendations included suggested principles or criteria for designation of contaminated sites, the precondition for issuing contaminated sites EPOs. Many of these suggestions were not incorporated into policy by Alberta Environment; however, some may be useful guides for the Director in making a choice between a substance release EPO and a contaminated sites EPO. One suggestion was that a contaminated site be designated in situations where an expanded public participation process, such as that provided under Part 5, Division 2 EPEA, is required. Given the broad scope of those provisions, use of a contaminated sites EPO might also be preferable in situations involving multiple contaminants or persons responsible, especially where some of the persons are not easily identifiable or are unable to remediate the contamination.

Conclusion

The lack of clear criteria to guide the use of substance release EPOs and contaminated sites EPOs for remediation creates challenges for parties who may potentially be involved with contaminated properties and for Alberta Environment as the regulator. Without such guidance, it is difficult for potentially responsible parties and their advisors to assess their likely liability. While the EAB's concern on this topic has been clearly enunciated, it is properly the role of the regulators and legislators to establish the guiding principles for effective use of the regulatory tools. The Minister of Environment's recent decision in the *Imperial Oil* appeal[15] is now the subject of an application for judicial review.

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Agricultural Development and the Loss of Biodiversity in Northern Alberta

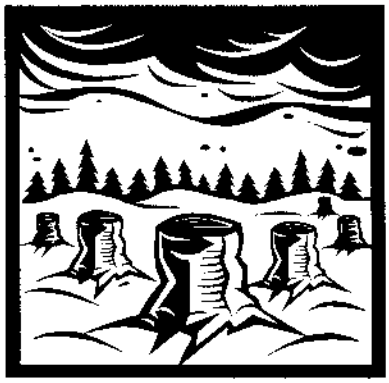
Introduction

Northern Alberta has experienced tremendous growth in resource development in recent years, including large-scale forestry operations, extensive oil and gas exploration and development, and the clearing of large tracts of land for agricultural purposes. This has resulted in a range of resource and land use conflicts.

A brief discussion of conflicts between the oil and gas industry and the agricultural sector in Northern Alberta was published in the last issue of *News Brief*.[1] This article examines the conflict involving agricultural development and the protection of biodiversity on forested public lands in northern Alberta.

Background

This conflict was brought to light in a report published by Alberta Environmental Protection as part of the Special Places 2000 process.[2] The report contains a detailed review of the main human activities and their ecological impacts in the Boreal Forest Natural Region and states that agriculture is the most important activity in respect to absolute area of habitat loss and thus a major contributor to the loss of biodiversity.



Habitat loss

The causes of biodiversity loss are complex and extensive. The main cause of current and potential concern to northern Alberta is habitat loss. Habitat loss is caused by deforestation (usually for crop production or range improvement for livestock), habitat fragmentation (often due to linear disturbances such as roads and seismic lines) and drainage and degradation of wetlands for agricultural purposes. The sale of public lands typically results in habitat loss and needs to be addressed, particularly when lands of marginal agricultural value are involved.

Legal framework

The allocation, use, and management of public land and resources (e.g., forests, agricultural lands, recreational lands, mines and minerals, water, etc.) are governed by a wide array of statutes and regulations. The most important and general statute governing public land in Alberta is the *Public Lands Act*.[3] The Act provides the legal scheme for management of Alberta's public lands through the classification of public land, administration of land dispositions and grazing dispositions, and administration, use, and allocation of provincially owned lands. Although most public land supports forest production, it also contains watersheds, wildlife habitat, recreational spaces, oil and gas well sites, agricultural production and industrial development.[4]

Provincial statutes and regulations that relate to the agriculture-biodiversity conflict need to be strengthened, in particular the *Public Lands Act* (PLA). The Act should be amended to incorporate a purpose section that mentions conservation and the preservation of biodiversity on public lands. Biodiversity should be defined in the PLA. It is also recommended that general provisions be added that set out the principles, objectives, or standards for the management of Alberta's public lands as a whole.

Far ranging ministerial discretion is also a major problem with the PLA. The Minister has broad powers to set aside land for various purposes and to sell public land. The PLA and regulations should be revised to reduce the amount of ministerial discretion and to increase the amount of public participation in the disposition granting process.

Where sales of public land occur, there should be some form of public participation in the process, which is currently lacking. It is recommended that a committee comprised of government officials, the general public, and non-governmental organizations be formed that reviews all proposals for the sale of public lands.

Conclusion

If the above reforms are advanced it is believed that the agriculture/biodiversity conflict will be diminished and biodiversity will be preserved. However, at the end of the day political will is required before many of these changes can be made. Unless political will exists to make these changes it is unlikely that meaningful change will occur and biodiversity in northern Alberta will continue to be lost.

Note: This article is part of a longer paper, in progress, which deals with the conflicts involving agricultural development and resultant loss of biodiversity in northern Alberta. That larger paper in turn represents one aspect of a larger project on resource conflicts in northern Alberta undertaken as part of a collaborative effort between the Environmental Law Centre and the Canadian Institute of Resources Law at the University of Calgary. To obtain further information or purchase the paper, call (780) 424-5099 or visit the Centre's website at www.elc.ab.ca.

■ **Robert Williams**
Barrister & Solicitor

1 See (2002) 17:2 *News Brief* 6.
2 Alberta Environmental Protection, *The Boreal Forest Natural Region of Alberta* (Edmonton: Alberta Environmental Protection, 1998). This is one of a series of reports prepared for the Special Places 2000 Provincial Coordinating Committee.
3 R.S.A. 2000, c. P-40.
4 See the Alberta Agriculture, Food and Rural Development website at <http://www.agric.gov.ab.ca/publiclands/publan26.html>.

In Progress

In the Legislature...

Manitoba Legislation

Bill 36, *The Drinking Water Safety Act,* was introduced on June 18, 2002. The Act establishes an Office of Drinking Water and provides for increased licensing, trading, monitoring and reporting requirements for water providers and testers. It also allows for the establishment of a provincial database to track drinking water risks and trends.

Saskatchewan Legislation

Bill 1, *The Ethanol Fuel Act* passed third reading on June 17, 2002 and received Royal Assent on June 20. With this legislation, Saskatchewan becomes the first province to establish the legal framework to allow for mandating an ethanol blend in gasoline sold in the province.

Federal Regulations

New *Metal Mining Effluent Regulations* were filed on June 6, 2002 to replace the current *Metal Mining Liquid Effluent Regulations* which were made on February 24, 1977. Sections of the new Regulations are in force as of June 6 with the remainder of them coming into force on December 6, 2002.

As of August 15, 2002, *Regulations Amending the Export and Import of Hazardous Wastes Regulations* and *Interprovincial Movement of Hazardous Waste Regulations* are in force. The new Regulations are required as a result of the new *Transportation of Dangerous Goods Regulations* that also came into force on August 15, 2002.

Alberta Regulations

The *South Saskatchewan River Basin Water Management Plan, Phase One, Water Allocation Transfers* was approved by Order-in-Council 321/2002 on June 25, 2002. The Plan was prepared in accordance with *The Framework for Water Management Planning in Alberta* and the *Water Act.* It is available from Alberta Environment's Information Centre at phone 780-944-0313.

Cases and Enforcement Action...

Carmichael et al. v. *Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation*. This Decision reports on the issues to be considered at the hearing of appeals of an Approval under the *Environmental Protection and Enhancement Act* and a Licence issued under the *Water Act* re: the construction, operation, and reclamation of a water treatment plant at Wabamun Lake.

Kievit et al. v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* This appeal of an Amending Approval issued re: the conversion of part of the fuel supply from natural gas to coal resulted in the Board recommending that the Amending Approval be upheld subject to a number of changes. The Minister ordered this be done on July 8, 2002. *See* Case Notes, *Individual Citizens Can Make a Difference*, this issue.

Parker et al. v. *Director, Central Region, Regional Services, Alberta Environment* re: *Peeters and Peeters-Matijsen*. This was an appeal of a Licence issued under the *Water Act* authorizing the diversion of water for stock watering. Settlement was reached at a mediation meeting and on June 4, 2002, the Minister ordered that the Licence be varied as agreed upon.

Enron Canada Power Corporation v. *Director, Northern East Slopes Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation*. This appeal was of an Approval issued for the construction, operation, and reclamation of a water treatment plant. The Board dismissed the appeal on the grounds that Enron was not "directly affected" and that the appeal was not "properly before the Board".

A Calgary Provincial Court Judge assessed a penalty of $40,000 to Allen's Trout Farm after the owner pled guilty to unauthorized rearing of Arctic char and unauthorized stocking in private fish ponds. The penalty consists of $12,500 in fines and $25,000 which was paid to the Alberta Conservation Association.

A date has been set for the resumption of a hearing into Glacier Power's proposed Dunvegan Hydroelectric Project. The joint Alberta Energy and Utilities Board/Natural Resources Conservation Board review panel hearing resumes on October 16, 2002 in Fairview. The Panel has prepared a list of those who will be registered parties when the hearing resumes. Other parties wishing to participate must provide the Panel with evidence of how they will be directly affected by the proposed development. Any new or additional information was to have been submitted by September 13, 2002.

A Provincial Court Judge fined Robert W. Weetman $10,000 after Weetman pled guilty to killing 11 bald eagles on his ranch near Williams Lake, B.C. The money is to go to the provincial Habitat Conservation Trust Fund.

■ **Keri Barringer**, *Staff Counsel*
Dolores Noga, *Librarian*
Environmental Law Centre

In Progress reports on selected environmental activity 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.

Estate Liability for Contaminated Land

Practically speaking, what is the liability of an estate as an owner or previous owner of contaminated land? Personal representatives and their lawyers dealing with contamination will need to consider not only the scope of the regulator's power to require clean-up by the estate, but also the potential liability of the personal representative and beneficiaries who inherit contaminated property.

Liability of the estate

Under Alberta's *Environmental Protection and Enhancement Act* (EPEA), the Director (a designated official within the Department of Environment) is empowered to issue an environmental protection order to a "person responsible" for a substance that is released into the environment ("substance release EPO", s. 113). "Person responsible for the substance" is defined to include the owner and previous owners of the substance, and any successor to them. An estate could therefore face clean-up costs where a contaminant is stored or used on contaminated property, even after the property is sold or distributed. Where contamination is the result of past use or storage by a previous owner, liability remains possible, but is less likely. However, a substance release EPO issued to more than one person is required under the Act to impose joint and several liability,[1] which may leave a party that was only minimally responsible to pay the clean-up costs up front.

A precondition to the issuance of a substance release EPO is a finding by the Director of an actual or anticipated "adverse effect", which means "impairment of or damage to the environment, human health or safety or property".[2]

EPEA also allows the Director to designate a site as contaminated, and then issue an EPO in connection with the contaminated sites ("contaminated sites EPO", s. 129). However, the availability of the more expedient substance release EPO means that the Director can require clean-up without designating the site as contaminated under EPEA. To date, the Director has relied exclusively on the substance release EPO to order clean-up of contamination. Even so, those dealing with estates should be aware of the possibility for formal designation under EPEA and the issuance of a contaminated sites EPO.

Once the Director designates a property as contaminated, a contaminated sites EPO can be issued to "a person responsible for the contaminated sites", which includes the owner and any previous owner of the land since the contaminant was brought on-site. Therefore, where a site is designated as contaminated, the estate is potentially liable for clean-up costs, and remains potentially liable even after the property is sold or distributed. Unlike the substance release EPO, a contaminated sites EPO allows the Director to apportion costs among responsible parties.

A site can only be designated as contaminated where the Director is of the opinion that the contamination has caused, is causing or may cause a "significant adverse effect". Although this term is not defined in EPEA, Alberta Environment has indicated that this means "an actual or high probability of impact which has or could have a severe consequence on human health, safety or the environment".[3] In addition, even if current contamination on a property does not meet this standard, change of use of the land to a more sensitive use has the potential to trigger designation in future.

However, the Department has indicated that it will avoid designation where satisfactory clean-up arrangements can be made with those determined to be "responsible persons".[4] Once approved by the Director, a negotiated or mediated settlement also ensures that no EPOs will be issued to the parties to the agreement. Even once a property is designated; the Department will encourage continuing negotiations for a remediation settlement among those responsible, including the potential involvement of a Department mediator.

The *Public Health Act* also provides for orders to be issued to any person, including an owner of contaminated land, where there is a risk of danger to public health.[5]

Liability of the personal representative and beneficiaries

A substance release EPO or contaminated sites EPO may also be issued to "any successor, assignee, executor, administrator, receiver, receiver-manager or trustee" of an owner or previous owner (among others) of the contaminant or contaminated land. On a practical level, the Department has indicated that personal representatives will not be personally liable for contamination that was present before their taking control of the property.[6] Furthermore, personal liability will be limited to situations where personal representatives are grossly negligent or deliberately unlawful in their operation of an activity or business on the property. Otherwise, liability will be limited to the value of the assets in the estate.

As successors to the deceased's property, beneficiaries also face potential liability for contaminated land they inherit. If land is contaminated and no arrangements for clean-up have been made, soil testing should be considered to establish baseline data as evidence that the beneficiary did not cause the contamination. Such evidence will likely limit, but will not eliminate, the liability of the beneficiary for any future clean-up costs. In very serious circumstances clean-up costs can exceed the value of the property, and, unless a remediation plan is already in place, disclaimer, or refusal of the gift, may be advisable.

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1 R.S.A. 2000, c. E-12, s. 240.
2 *Ibid.*, s. 1(b)
3 Alberta Environment, "*Guideline for the Designation of Contaminated sitess under the Environmental Protection and Enhancement Act*" (Edmonton: Alberta Environment, 2000), glossary
4 *Ibid.* s. 3
5 R.S.A. 2000, c.P-37, s. 62
6 *Supra* note 3, s. 3.1.3

Case Notes

Individual Citizens Can Make a Difference

Kievit v. Director, Approvals, Southern Region, Regional Services, Alberta Environment re: Lafarge Canada Inc. (27 May 2002) 01-097,98 and 101-R (Alberta EAB)

This decision involved an appeal to an amending approval (approval) issued by Alberta Environment to Lafarge Canada Inc. in October 2001. The approval granted Lafarge permission to change part of the fuel supply from natural gas to coal at its cement manufacturing plant at Exshaw, Alberta, located within the Bow Valley corridor. Nine individuals and one Coalition submitted notices of Appeal to the Alberta Environmental Appeal Board (EAB). The EAB accepted three individual appeals as being directly affected, and granted party status to a citizens group.

Issues and recommendations

At a preliminary meeting the appellants argued that any effects of burning coal should be considered, even if it might ultimately change the original approval. The EAB agreed that it could review the amending application and deal with environmental issues that could directly or indirectly result from the conversion to coal. The EAB stated that air quality guidelines set by Alberta Environment provided an appropriate reference point for its consideration, particularly with respect to enforcement of the guidelines in locations such as the Bow Valley corridor. It is in the corridor where users place a high intrinsic value on the recreational, aesthetic and ecological values of the area.[1]

Sulphur dioxide (SO_2) was a major concern at the hearing and the appellants' position was that exceedences in the predicted modeling should be dealt with in the Approval. The Director had ordered the approval holder to develop a plan to reduce SO_2 emissions by 25% for consideration by the Director in June 2005. The EAB concluded that one full year of operation under the new operating system would be adequate experience for development of an SO_2 emission plan, rather than almost 3 years of operation originally approved by the Director. The EAB further concluded that an additional 6 months would be sufficient for the reduction plan to be implemented, with full implementation by June 2005.

The appellants argued that best available demonstrated technology (BADT) should be a requirement of the Approval. The EAB agreed and recognized the importance of implementing a BADT policy when exceedences of ambient environmental quality guidelines are predicted. It concluded the approval holder should be required to submit evidence to Alberta Environment for defining BADT for the industry, particularly with reference to SO_2 emissions. The EAB recommended that this be submitted prior to the application for renewal of the approval on May 1, 2007.

With respect to monitoring, the appellants expressed concern about the time limitations imposed for some monitoring requirements. The EAB responded that it was prepared to rely on the Director's discretion with respect to any modifications. The appellants suggested and the EAB recommended encouraging all parties to participate in an air quality management zone to address the monitoring issues.
With respect to a health and vegetation study, the appellants proposed it be completed within one year of the fuel conversion rather than March 2004. They also argued that the study should have been completed before the application for approval was submitted, although they conceded in their closing argument that it would be acceptable to do it after the conversion. The EAB agreed to the merit of that argument, concluded that immediate consultation with interested parties should begin, and recommended an earlier study completion date, before the end of December 2003.

Although the appellants requested the EAB prohibit the burning of coal and tires at the same time, the EAB left this decision to the Director's discretion, pending supplementary information from the approval holder. The EAB recommended that the Director vary the approval to require studies (on the causes and control of blue haze) be undertaken no later than the May 2007 renewal application, if it remains an issue. The EAB also recommended that Lafarge establish a complaint line for local citizens.

Results and Order

As a result of the effort and commitment of the appellants, the final order signed by the Minister of Environment incorporated virtually all of the recommendations from the EAB report, resulting in stricter requirements for the approval holder's operations. This is a significant result since it could lead to stronger standards being set when future applications are made to amend existing approvals. Despite the ordered revisions, some decisions remain at the Director's discretion. Not all of the arguments presented by an appellant will necessarily need to be addressed for them to have a satisfactory outcome. Obtaining directly affected status is always an important step, and retaining legal representation can greatly assist appellants in successfully presenting their case.

An appellant may not always want to quash a decision in the appeal process. In this case the appellants were prepared, and argued for the placement of certain conditions they considered necessary to improve on the amended approval. The result has opened up the amendment process as a means of setting potentially stronger standards, and requiring companies to research and provide evidence of BADT for Alberta Environment to use in future approval processes.

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Case Notes

Trouble for Toxic Torts as Class Actions

"'Why should we tolerate a diet of weak poisons, a home in insipid surroundings, a circle of acquaintances that are not quite our enemies...? Who would want to live in a world which is not quite fatal?'"

ecologist Paul Shepard in Rachel Carson's *Silent Spring* (1962).

Introduction

Two recent judicial pronouncements deal a serious blow to plaintiffs trying to seek relief for toxic torts by way of a class action. Although toxic torts - where a person is injured by exposure to a toxic substance through the fault of another - are becoming increasingly prevalent, the system of civil responsibility is proving less and less adept at dealing with them. At first glance, toxic wrongs appear well suited to a class action proceeding, since they frequently involve a large group of people who have been exposed to the same pollution.

Background

In *Hollick* v. *Toronto (City)*[1] an action was brought to represent some 30,000 residents who lived in the vicinity of Toronto's Keele Valley landfill. Hollick alleged that the landfill had been unlawfully emitting "large quantities of methane, hydrogen sulphide, vinyl chloride and other toxic gases" into the air.[2] In *Pearson* v. *Inco Ltd.* the class was to encompass the 20,000 residents of Port Colborne, Ontario.[3] The plaintiff maintained that testing in the area had found, among other things, significant amounts of nickel and nickel oxide in the local air and land.[4] The Ministry of the Environment confirmed that all of the nickel contamination in the area came from one source: the Inco refinery that had been in operation since 1918, and that had emitted over 20,000 tonnes of the element over the years.[5] The result of these years of exposure was claimed to be "extensive, severe and widespread damage to the physical and emotional health and well being of the proposed class members as well as extensive damage to their lands, homes and businesses."[6] More specifically, the contamination was alleged to have caused higher rates of cancer and lung disease.[7]

The decisions

In both cases, the motion to certify the class action was rejected. Both actions were decided under Ontario's *Class Proceedings Act, 1992*.[8] Although similar legislation is absent in Alberta, class actions under the *Alberta Rules of Court*[9] have been recognized by the Supreme Court of Canada.[10] Recent reform recommendations suggest that Alberta adopt the model for modern class action legislation that has been enacted in British Columbia, Ontario, and Quebec.[11]

Under the *Class Proceedings Act, 1992* there are five requirements that must be satisfied before a motion can be certified,[12] but both cases were decided on the "preferable procedure requirement".[13]

In order for a class action to be the preferable procedure it must be in the interests of judicial economy, access to justice, and behaviour modification.[14] Of these it is the first advantage of class actions, that of judicial economy or the efficient handling of the common issues, which seems to present the largest stumbling block for mass toxic tort cases. As stated by Chief Justice McLachlin:

> Turning first to the issue of judicial economy, I note that any common issue here is negligible in relation to the individual issues. While each class member must, in order to recover, establish that the Keele Valley landfill emitted physical pollution or noise pollution, there is no reason to think that any pollution was distributed evenly across the geographical area or time period specified in the class definition.[15]

In *Inco*, Justice Nordheimer echoed this concern with respect to the variation in contaminant levels throughout the relevant geographic area.

Analysis

The emphasis on the variability of exposure makes it extremely difficult to argue that future toxic tort cases should proceed as class actions. It is hard to imagine a fact pattern, except for the one-time toxic spill, where pollution will be "distributed evenly across the geographical area or time period". It should be noted, however, that these decisions are not out of line with other jurisdictions. In *Inco*, Nordheimer J. cited approvingly U.S. authorities that had rejected class actions on similar grounds.[16]

These cases are important because they highlight the inability of the tort law to deal with modern environmental wrongs. Assuming the truth of the alleged facts in these two cases, the residents of Port Colborne and Keele Valley would suffer from higher incidences of cancer and respiratory illnesses; go to the hospital more often; have a lower life expectancy; lose significant amounts of money in depreciated property value; and might not be able to work. These would be real, tangible injuries caused by the fault of another, yet those injured would face significant challenges in making their individual cases.

Establishing a causal link between polluter and injury is not easy in toxic tort cases.[17] Long latency periods, multiple defendants, and diseases that may have multiple causes make it difficult to prove that "but for" the defendant's tortious conduct no injury would have occurred.

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It is possible that the courts may ultimately provide some guidance in this area or take a decision that spurs the regulators and legislators to do so.

■ **Cindy Chiasson**
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Note: The Environmental Law Centre will begin a two-year project in January 2003 that will involve a legal review of Alberta law related to brownfield development (development of previously contaminated properties that have been remediated) and will result in development of a law reform brief and consumer fact sheet. This project will be undertaken with the generous support of the Alberta Real Estate Foundation. For more information about this project, contact the Centre at 1-800-661-4238 or elc@elc.ab.ca.

1 R.S.A. 2000, c. E-12.
2 The term "person responsible" is defined in s.1(tt) EPEA.
3 The applicable definition for contaminated sites EPOs is that of "person responsible for the contaminated site", set out in section 107(1)(c) EPEA.
4 Information gathered from the Environmental Enforcement Historical Search Service, Environmental Law Centre.
5 *Supra* note 1 at s. 123
6 *Re McColl - Frontenac Inc.* (2001) 44 C.E.L.R. (N.S.) 209 (Alberta EAB), hereinafter "McColl-Frontenac" and *Imperial Oil and Devon Estates Ltd. v. Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment, re: Imperial Oil Ltd.* (21 May 2002) 01-062-R (Alberta EAB), hereinafter "Imperial Oil".
7 *McColl-Frontenac, ibid.* at 227 and *Imperial Oil, ibid.* at 17.
8 *Imperial Oil, supra* note 6.
9 *McColl-Frontenac, supra* note 6.
10 *Supra* note 1 at s. 125(1).
11 *Guideline for the Designation of Contaminated Sites under the Environmental Protection and Enhancement Act* (Edmonton: Alberta Environment) April 2000 at 1.
12 *Ibid.* at 2-3.
13 See *McColl-Frontenac, supra* note 6 at 229 and *Imperial Oil, supra* note 6 at 31 for discussion of the prospective element of ongoing contamination.
14 *Recommendations of the Contaminated Sites Implementation Advisory Group* (Edmonton: Alberta Environmental Protection, 1994).
15 *Imperial Oil, supra* note 6.

(Trouble for Toxic Torts . . Continued from Page 7)

By closing the door on class actions one more avenue of redress for the toxic tort victim is barred.

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1 (2002) 42 C.E.L.R. 26 (S.C.C.) [hereinafter *Hollick*].
2 *Ibid.* at para. 5
3 (15 July 2002) Toronto 01-CT-012023-CP (Ont. Sup. Ct.) [hereinafter *Inco*].
4 *Ibid.* at paras. 8-15.
5 *Ibid.* at paras. 9 and 13.
6 *Ibid.* at para. 3.
7 *Ibid.* at para. 19.
8 S.O. 1992, c. 6.
9 Alta. Reg. 390/98, rr. 42.
10 *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] S.C.C. 46.
11 Alberta Law Reform Institute, *Class Actions, Final Report No. 85* (Edmonton: Alberta Law Reform Institute, 2000)
12 *Supra* note 8, s. 5(1)(a)-(e)
13 *Ibid.*, s. 5(1)(d).
14 *Hollick, supra* note 1 at para. 27.
15 *Ibid* at para. 32
16 *Inco, supra* note 3, at para. 126.
17 E. L. Hughes et al., *Environmental Law and Policy*, 2nd ed. (Toronto: Emond Montgomery, 1998) at 101

The ELC is looking for lawyers interested in environmental law.

The Environmental Law Centre (ELC) is looking for lawyers who would be interested in referrals on environmental law matters.

The ELC is an Edmonton based charity that is committed to providing high quality legal services in environmental and natural resources law. Our clients can range from the general public, to non-governmental organizations and the business community. We regularly receive questions (over 900 in 2001) that run the gamut of environmental law topics: from air quality to water rights.

Due to restrictions imposed by our funders, our in-house lawyers cannot provide legal representation for our clients. When the need does arise we try to refer our clients to lawyers who have experience or interest in the field. Unfortunately our referral network is not exhaustive, and to some extent we cannot always offer our clients the best information on who to contact for representation. In an effort to expand our current referral system we are trying to locate lawyers across the province that may be interested in taking on clients with environmental law concerns.

An extensive background in environmental law is not required, but a keen interest in the field certainly is. We think that the more diverse and complete our referral list is, the better our clients will be served.

If you are interested in the possibility of receiving referrals on environmental law matters please contact James Mallet at (780) 424-5099 (Edmonton area) or 1-800-661-4238 (Alberta toll-free) or by e-mail at jmallet@elc.ab.ca. You can also visit our website at www.elc.ab.ca.

(Individual Citizens Can Make a Difference . . Continued from Page 6)

The issue of the timing of health studies in the application process was also brought to the forefront. It is hoped these results will provide encouragement to other individuals and groups who wish to protect ecologically and recreationally significant areas in the future, and provide incentive for them to keep trying.

■ **Keri Barringer**
Staff Counsel
Environmental Law Centre

1 *Kievit et al. v. Director, Approvals, Southern Region, Regional Services, Alberta Environment re: Lafarge Canada Inc.* (27 May 2002) 01-097, 098 and 101-R (Alberta EAB) at 8.

Environmental Law Centre Donors - 2001

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 2001. They are:

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Administrative Penalties

The following administrative penalties over $1,500 were issued under the *Environmental Protection and Enhancement Act* since the last issue of *News Brief*:

- $2,000 to Ainsworth Lumber Co. Ltd. operating in Grovedale, for contravening their Approval to operate the Grande Prairie wood processing plant by submitting the 2000 Annual Industrial Wastewater and Runoff Report late.
- $7,000 to Fimrite Oilfield Services Ltd. operating a used oil storage facility in Saddle Hills County, for failing to meet the design requirements of their Approval and failing to immediately report a contravention of the Approval.
- $3,000 to Pace Industrial Refrigeration Limited of Calgary, operators of a dairy product processing facility that uses an ammonia based refrigeration system, for improper disposal of waste on or into the bed and shore of the Bow River, without the agreement of the owner of the land. The penalty was assessed under s.173 of the *Environmental Protection and Enhancement Act*.
- $3,000 to Shiningbank Energy Ltd. operating in the Municipal District of Brazeau No. 77 for late submission of and/or failure to submit some reports as required by their Approval to operate the Berrymoor sour gas plant. The penalty was assessed under s.213(e) of the *Environmental Protection and Enhancement Act*.
- $3,500 to Taurus Exploration Ltd. operators of the Whitecourt sour gas processing plant in Woodlands County, for contravening their Approval by failing to submit some reports. This failure violated s.213(e) of the *Environmental Protection and Enhancement Act*.
- $2,000 to Suncor Energy Inc., operators of the Simonette sour gas plant in the Municipal District of Greenview No. 16, for late submission of its Manual Stack Survey Report. The penalty was assessed under s.213(e) of the *Environmental Protection and Enhancement Act*.

The following administrative penalties over $2,000 were issued under the *Public Lands Act* and *Forests Act* since the last issue of *News Brief*:

- $3,027.50 and $500. to Husky Oil Operations Limited of Calgary for unauthorized use of public land and contravening terms and conditions of their lease in violation of s.48(1) and 49(1) of the *Public Lands Act*.
- $5,090.76 to Canadian Superior Energy Inc. of Calgary for unauthorized use of public land contrary to s.48(1) of the *Public Lands Act*.
- $4,228.88 to Olympia Energy Inc. of Calgary for unauthorized use of public land in violation of s.48(1) of the *Public Lands Act*.
- $17,751.85 also to Husky Oil Operations Limited of Calgary for unauthorized use of public lands in violation of s.48(1) of the *Public Lands Act*.
- $15,443.60 to Calling Lake Lumber Co. Ltd. of Athabasca for unauthorized harvesting of timber in violation of s.10 of the *Forests Act*.

The Environmental Law Centre Welcomes New Staff Counsel

Keri Barringer

Keri Barringer received her law degree from the University of Calgary and was admitted to the Alberta and Northwest Territories Bars in 1997. After articling in Yellowknife, she worked in private practice in Calgary prior to joining the Environmental Law Centre in May 2001. Ms. Barringer holds a B.Sc. in Environmental Studies from the University of Winnipeg, and a Masters in Natural Resource Management from the University of Manitoba.

Her current initiatives at the Environmental Law Centre include participating in air quality management and standards review, natural use trail designation, and assisting the public with environmental law issues such as municipal development and environmental appeal processes. Ms. Barringer is an executive member of the Environmental Law section of the Canadian Bar Association, Northern Division.

James Mallet

James Mallet received his law degree from the University of Alberta and was admitted to the Alberta Bar in 2002. After articling in Edmonton, he joined the Environmental Law Centre as staff counsel in July 2002.

He has worked for the Quebec Department of Environment as a nature guide and translator, and for the ELC as a summer student. Mr. Mallet holds a B.A. in History from Oberlin College and a M.Mus. from Rice University.

Mr. Mallet's current focus areas at the Environmental Law Centre include jurisdictional issues, municipal land use and redevelopment issues, and private prosecutions under environmental legislation.

By Regan Morris, Research Assistant, *Environmental Law Centre*

Release Reporting Requirements

In a society increasingly dependant on a myriad of chemical products, the control and regulation of toxic substances is of paramount importance.[1] According to Justice La Forest of the Supreme Court of Canada: "Whether viewed positively as strategies for maintaining a clean environment, or negatively as measures to combat the evils of pollution, there can be no doubt that these measures relate to a public purpose of superordinate importance".[2]

Fundamental to modern toxics legislation is the requirement to report when substances are released into the environment. This way, further damage can be averted and remediation can get underway as soon as possible. Voluntary reporting is also seen by Alberta Environment as the cornerstone of its enforcement and compliance system, for without the knowledge of a spill, it is extremely difficult for the department to do its job. For this reason, the department enforces reporting requirements stringently. It is far better for someone who has released a substance to report it than to face a serious penalty for failing to do so.

There are both provincial and federal requirements to report the release of toxic substances. Both jurisdictions have legislation of a general nature governing the release of toxics and more specific legislation for certain substances.

Alberta legislation

The provincial regime is governed by the *Environmental Protection and Enhancement Act* (EPEA)[3] and the *Release Reporting Regulation*.[4] The *Release Reporting Guideline* provides additional information on how Alberta Environment will interpret and apply the legislation.[5]

Under the *EPEA*, "the release of a substance into the environment that may cause, is causing or has caused an adverse effect" must be reported.[6] "[A]dverse effect" is defined broadly, and the onus is on the "person responsible" (defined in EPEA) to determine whether the release could be damaging. An oral report must be filed as soon as the person responsible has become aware or should have become aware of the release. A follow-up written report may also be required. Besides having to report to the responsible authorities there is also a duty to notify members of the public "directly affected" by the release.[7]

Other specific requirements are set out in the *Release Reporting Regulation*. Some substances regulated by the federal *Transportation of Dangerous Goods Act, 1992*[8] (TDGA) must be reported to Alberta Environment as well as to federal authorities. The *Release Reporting Guideline* adds that small releases of substances that may not on their own cause an adverse affect must be reported if they are part of a number of such releases whose cumulative effects may be damaging.[9]

Some substances, like those regulated by the *Oil and Gas Conservation Act*[10] and the *Dangerous Goods Transportation and Handling Act*,[11] have their own reporting requirements as set out within the applicable legislation and are not subject to the *EPEA* requirements.[12] Also, releases of explosives and radioactive materials regulated by the *TDGA* do not have to be reported to provincial authorities, but only to the federal Department of Transport.[13]

Federal legislation

At the federal level, under the *Canadian Environmental Protection and Enhancement Act, 1999*[14] (CEPA) the release of substances listed on the *List of Toxic Substances*[15] or prescribed in the regulations must be reported to federal officers.[16] Similar to provincial requirements, there is also a duty to notify affected members of the public.[17] Currently there are just over 50 substances listed as toxic under CEPA.

For certain substances (i.e. vinyl chloride and pulp and paper mill effluent), administrative authority has been transferred to Alberta Environment[18] and application of the CEPA requirements suspended in Alberta.

If a substance is released into an aquatic environment it may trigger a reporting requirement under section 38(4) of the *Fisheries Act*[19] if it is a "deleterious substance" (*vis à vis* fish habitat). "Deleterious substance" is defined in the *Fisheries Act*.

Other federal legislation, like the *TDGA*, may contain other reporting requirements for substances. As noted above, some *TDGA* substances may have to be reported to both provincial and federal authorities.

Conclusion

Viewed as a whole, the legal requirements to report the release of potentially toxic substances may seem complicated, not to mention mundane, but they do indeed serve a purpose of 'superordinate importance'. The duty they impose on all of us to treat the release of chemicals into the environment seriously should not be taken lightly.

1 This article will refer to "toxic substances" as any substance that has the potential to cause harm to human health or the environment, rather than to how "toxic" may be defined in certain legislation.
2 *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213 at para. 85 where a narrow majority of the Supreme Court upheld provisions of the *Canadian Environmental Protection Act* as a valid exercise of the federal criminal law power.
3 R.S.A. 2000, c. E-12, ss 110-111.
4 Alta. Reg. 117/93.
5 Alberta Environment, *Release Reporting Guideline* (Edmonton: Alberta Environment, 2001). The Guideline can be obtained online at <http://www.gov.ab.ca/env/protenf/standards/index.html>.
6 *Supra* note 3, s. 110(1).
7 *Supra* note 3, s. 110(1)(b)-(e).
8 S.C. 1992, c. 34.
9 *Supra* note 5 at 2.
10 R.S.A. 2000, c. O-6.
11 R.S.A. 2000, c. D-4.
12 *Release Reporting Regulation*, *supra* note 4, s. 2(a).
13 *Ibid.*, s. 2(b).
14 S.C. 1999, c. 33.
15 *Ibid.*, Sch. 1.
16 *Ibid.*, ss. 95-97. See also ss.179, 193, 201, and 212.
17 *Ibid.*, s.95(1)(c).
18 *Alberta Equivalency Order*, S.O.R./94-752.
19 R.S.C. 1985, c. F-14.

Ask Staff Counsel

Industrial Activity on Crown Land and Trappers' Compensation

Dear Staff Counsel:
I am a trapper licensed to trap on public land north of Edmonton. Last year an oil and gas company put a cut-line through my trapping area, damaging my traps and other trapping equipment. The company said proper notice was given, and that I should have removed my equipment in time. Can I be compensated for my lost equipment? I am also concerned about the effects of the company's activities on animal populations and my fur harvest.

Sincerely, Marten Katcher

NOTE: *This column does not address treaty or other aboriginal trapping rights.*

Trappers are granted permission to trap specific areas of Crown land under registered fur management licenses, which are issued by Alberta Sustainable Resource Development, Fish and Wildlife Division. The *Wildlife Act* and *Wildlife Regulation* establish procedures for the licensing of trappers, and standards and practices for trapping in the province.

It is common for Crown land to be subject to multiple and potentially conflicting uses. Where industrial activity is permitted on Crown land that is also a registered fur management area, there is a potential for damage to traplines, trapping equipment, fur-bearers and their habitat.

In response to trappers' concerns, the Alberta Trappers' Association, Alberta Environment, and certain companies and industry associations have established and maintain the Alberta Trappers' Compensation Program. The Program is provided for in a Memorandum of Understanding (MOU), an agreement that, with an attached policy & procedures document, sets out the expectations and commitments of the parties involved.[1]

The MOU provides that it is the responsibility of industry to make "a reasonable effort" to notify trappers 10 days prior to commencement of the activity. There is no indication as to what is considered "reasonable", but "personal contact is preferred, backed up by written documentation."

Once notified, it is the trapper's responsibility to either move any equipment or other trapping assets, or to notify the company to work out a solution. Any negotiations depend on the goodwill of the trapper and the company- the MOU does not require the company to change its plans.

Where a company fails to provide notice, or fails to make a "reasonable effort" to do so, the MOU requires the losses suffered by the trapper to first be discussed with the company involved. If there is no settlement, the trapper can bring a claim before the Trappers' Compensation Board ("the Board") through the Fish & Wildlife Division.

While the Board can compensate trappers for losses due to forest fire, arson, theft and vandalism, the Board is not able to compensate trappers for direct losses such as yours. Furthermore, no Board compensation is available for losses from temporary disruptions or long-term loss of livelihood unless a responsible company cannot be identified. It is also important to note that a finding by the Board that the trapper is entitled to compensation from a company is not legally binding on the company - it is a recommendation only.

There is nothing preventing you from suing the company instead of filing a claim with the Board. Furthermore, if you bring a claim before the Board but are not satisfied with the result, you are still entitled to bring a civil action before the courts. However, time limits apply to civil actions, and if you decide to file a claim with the Board before suing you should consult a lawyer to determine the applicable deadlines.

Government, industry and the Alberta Trappers' Association are currently negotiating a revised MOU regarding trappers' compensation. Trappers like you, as well industry and regulators, could benefit from clearer commitments on required notice to trappers.

[1] Memorandum of Understanding Concerning the Administration of the Alberta Trapper Compensation Program (1998) and Alberta Trappers' Compensation Program Policy & Procedures (1998). These documents are available through the Alberta Trappers' Compensation Board.

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.

Prepared by:
James Mallet
Staff Counsel

Alberta Law Foundation