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Draft Provincial Water Strategy Stresses Partnerships

In March 2003, the Alberta Government released *Water For Life: Alberta's Strategy for Sustainability (Draft for Discussion)*.[1] The Strategy builds on consultations the government has conducted over the last year and a half, and will provide the framework for the final strategy, to be released in Fall 2003.

Background

In the first phase of the strategy's development, a focus group of Albertans identified problems, challenges and opportunities for improving water management in the Province (early 2002). In the second phase, key stakeholders and the public responded to the ideas of the focus group (April 2002). More recently, a group of more than 100 experts and stakeholders met to discuss and respond to the results of the second phase (the Minister's Forum on Water, June 2002).[2]

The draft strategy

The draft strategy stresses the following points:

- The need for water management within the capacity of individual watersheds (an area that drains into a common waterway). In other words, decision-making is to be informed and guided by local requirements, needs and concerns;
- The shared responsibility of citizens, communities, industry and government for water management in Alberta;
- The need for a better understanding of Alberta's water supply and quality;
- The appropriateness of the current "first in time, first in right" basis for allocation priority, and the need for water allocations to be transferable within basins;
- The need to protect ground, surface and drinking water quality; and
- The need to protect aquatic ecosystems.

The provincial government requested feedback from stakeholders and the public on the draft strategy, and imposed a deadline of May 31, 2003. The Environmental Law Centre responded in the form of an open letter to Minister of Environment Lorne Taylor, which is available on the Centre's website.[3] The letter raises important concerns about many aspects of the strategy including water pricing, water diversion and storage projects, interbasin transfers, allocation transfers, and habitat and source protection. Other components of the strategy, including the watershed approach, metering, monitoring, and reducing uses that remove water from the hydrological cycle, are strongly supported. This article addresses a key component of the strategy: watershed-level management through partnerships with stakeholders.

Shared governance: water management partnerships

The draft strategy identifies three levels of partnership under which stakeholders can influence water management. The Provincial Water Advisory Council will guide implementation of the strategy and advise government on policy matters.

(Continued on Page 2)

(Draft Provincial Water Strategy . . . continued from Page 1)

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The government envisions that this Council will function in a similar manner to the widely supported Clean Air Strategic Alliance (CASA). CASA is a multi-stakeholder group formed in 1994 to build consensus and advise the provincial government on air quality policy issues.

At the watershed level, Watershed Advisory Councils will identify and prioritize local water management issues, and work with government to develop water management plans. These Councils will also have educational responsibilities geared toward conservation, and will have membership on the Provincial Water Advisory Council. Councils are planned for each of the Milk, Oldman, Bow, Red Deer, North Saskatchewan, Cold Lake-Beaver, Athabasca and Peace River watersheds.

The strategy also recognizes the importance of local, community-based Watershed Protection Groups in the protection of local lakes, streams and aquifers. These groups will not report to Watershed Advisory Councils, but will be encouraged to participate in, provide input to, and share information with the Councils.

Ensuring an effective role for partners

The draft strategy's emphasis on providing a basis for meaningful public participation in water management decision-making is welcome. Such participation will encourage a sense of ownership and responsibility for our water, and lead to a better-informed public. However, it is unclear at this point whether the resources necessary to ensure meaningful participation will be forthcoming. In particular, proper funding is essential to ensuring a level playing field for all partners and to maintaining confidence in the partnerships. A stable source of funding must also be available to Watershed Protection Groups to undertake local water protection measures.

In order to participate effectively in water management, the stakeholder groups must also be as well-informed as possible. This will require unfettered access to all information pertaining to water management issues under consideration.

An over-arching concern regarding the partnership approach is the possibility that responsibility for protecting habitat and ensuring our water is safe will be downloaded onto partners. It is essential that the provincial government remain accountable for these issues as well as for adequate resourcing and staffing of water management programs.

Conclusion

The draft strategy indicates that there is likely to be greater opportunity for stakeholders to participate in decisions affecting Alberta's water. In fostering such participation, the government has an invaluable role to play in terms of administration, expertise, financial support, information sharing, and increasing public awareness. The strategy's plan for watershed-level management and stakeholder involvement is sound. However, it is unclear just how the government will ensure that the stakeholder groups have the resources, information and support needed to make effective decisions.

■ **James Mallet**
Staff Counsel
Environmental Law Centre

[1] (Edmonton: Alberta Environment, 2003). This document is available on Alberta Environment's *Water For Life* website at <http://www.waterforlife.gov.ab.ca>.

[2] Summaries of input from phase one, phase two (*Pooling Your Ideas Summary Report*) and phase three (*Minister's Forum on Water Summary Report*) are available on the *Water For Life* website, *ibid*.

[3] Environmental Law Centre, *Comments on Water For Life: Alberta's Strategy for Sustainability (Draft)* (Edmonton: Environmental Law Centre, 2003). This submission is available online through the Centre's website at <http://www.elc.ab.ca>.

New Split-Receipting Income Tax Rules for Charitable Gifts

By Arlene Kwasniak, *Assistant Professor of Law, Faculty of Law, University of Calgary*

For years registered charities have been unclear and frustrated by federal tax authorities' (currently Canadian Customs and Revenue Agency (CCRA) and previously Revenue Canada) interpretation of what constitutes a "gift" for federal income tax purposes. The federal position has been that to be a "gift" for tax purposes, a transfer of money or property must be made in exchange for no benefit or advantage at all, or only for a truly insignificant one. Consequently, charities have been hampered in offering any benefits to donors except *de minimis* ones. And with *de minimis* gifts, charities have been challenged in ascertaining what qualifies in the absence of clear interpretative guidelines. Surely a free cup or tee shirt should qualify for a gift of say, $200, but what about greater benefits, such as free attendance to charity functions, or free publications?

Perhaps the most affected by CCRA's gift policy have been charities that operate as land trusts, such as the Nature Conservancy of Canada, Ducks Unlimited Canada, Southern Alberta Land Trust, and others. These charities urge landowners to donate land or conservation easements to them for conservation purposes. However tax rules on what constitutes a gift prohibited them from issuing tax receipts where the donor received any valuable consideration. For example, if a landowner owned a quarter section of land with a market value of $100,000 and wished to donate it to the Nature Conservancy, to receive any valid tax receipt at all, the landowner had to forego all return of value for the property. The landowner could not, for example, transfer the land to the Nature Conservancy for $50,000 and receive a $50,000 tax receipt. If the donor wanted to make a gift of half of the value of the parcel, the donor had to subdivide the property and sell half to the land trust, and donate the other half. This time consuming, costly method of giving, subject to potential loss of land through municipal regulatory dedications, discouraged such charitable donations.

Recently the CCRA has announced its intention to broaden its view on what constitutes a gift for income tax purposes by allowing what is called "split-receipting" in some instances. The Department of Finance has released draft amendments to the *Income Tax Act*[1] to facilitate the changes.[2] Under the "Proposed Guidelines on Split-Receipting"[3] the key elements to this new interpretation are as follows:

> (a) For there to be a gift there must be a voluntary transfer of property to the donee with a clearly ascertainable value.
>
> (b) The donee (charity) must identify any advantage and the amount of the advantage on any receipt provided to the donor in accordance with proposed regulatory amendments. If the advantage cannot be readily ascertained, CCRA will not allow a charitable tax deduction or credit.
>
> (c) For there to be a gift there must be a clear donative intent to enrich the donee. Generally CCRA will accept a gift if the amount of the advantage does not exceed 80% of the value of the property transferred to the donee. In exceptional circumstances a transfer may qualify if the amount of the advantage exceeds 80% provided that it can be established to the Minister's satisfaction that the donor intended to make a gift.
>
> (d) Generally, under the amendments, the "eligible amount of a gift" will be "the excess of value of the property transferred to the donee over the amount of the advantage provided to the donee". CCRA will continue to administer a *de minimis* threshold to enable charities to provide donors with tokens of gratitude for donations without falling under the new rules requiring a split receipt. The current *de minimis* threshold[4] will be revised so that an advantage received by a donor will not be regarded as an advantage for the purposes of determining the eligible amount of a gift under the new definition, provided that the advantage received does not exceed the lesser of 10% of the value of the property transferred and $75.00.

The Proposed Guidelines provide useful illustrations on how the amendments would be applied in respect of a number of activities carried on by registered charities, including fund raising event activities (such as attendance of celebrities and other complimentary benefits), fundraising dinners, charity auctions, lotteries, concerts, shows and sporting events, membership fees, and transfers of mortgaged and otherwise encumbered property.

The writer welcomes these greatly needed changes and clarifications. Allowing split-receipting will encourage more landowners to donate ecologically important land and other capital properties to registered charities. Clarification by quantifying what constitutes a *de minimis* advantage will make many executive directors and accountants of registered charities sigh in relief for not having to worry about CCRA's disqualifying donations and challenging registered status on account of conferred benefits.

The reader should note that these amendments have not yet been introduced. Readers who have comments on the Proposed Guidelines, should contact their Members of Parliament.

1 R.S.C. 1985, c. 1 (5th Supp)

2 The main changes would be to ss. 118.1 (Charitable Donations Tax Credit and Gifts of Capital Property) and 248(30)-(33) (Eligible Amount of Gift, Amount of Advantage, Intention to Give, and Cost of Property Acquired by Donor). The proposed amendments, dated December 20, 2002, are available from Finance Canada for a fee, or can be accessed online at <http://www.fin.gc.ca/drleg/02-107_e.html#Legislative>.

3 "Proposed Guidelines on Split-Receipting", *Income Tax Technical News No. 26*, Dec. 24, 2002, at 1-2, available online at <http://www.ccra-adrc.gc.ca/E/pub/tp/itnews-26/>.

4 The current *de minimus* threshold may be found in Interpretation Bulletin IT-110R3, *Gifts and Official Receipts*

In Progress

In the Legislature...

Federal Legislation

Bill C-9, *An Act to amend the Canadian Environmental Assessment Act*, passed third reading on May 6, 2003. It is now proceeding through the Senate and was referred to the Senate Standing Committee on Energy, the Environment and Natural Resources.

As of March 24, 2003, sections 1, 134 to 136 and 138 to 141 of the *Species at Risk Act* are in force. The remainder of the Act is anticipated to be brought into force in early June 2003. The federal government issued an *Order Extending the Time for the Assessment of the Status of Wildlife Species*, which extends for three years the time provided for the assessment of the status of the wildlife species set out in Schedule 2 of the Act.

Federal Regulations

The federal Minister of the Environment released *New Source Emission Guidelines for Thermal Electricity Generation*. These are a revised version of the former Guidelines that were issued on May 15, 1993 and are made pursuant to the *Canadian Environmental Protection Act, 1999*. The new Guidelines will be in force as of April 1, 2003.

As of January 1, 2004, the *On-Road Vehicle and Engine Emission Regulations* will be in force. The Regulations introduce "more stringent national emission standards for on-road vehicles and engines and a new regulatory framework under the *Canadian Environmental Protection Act, 1999*." Provisions in the Regulations that authorize the use of a national emissions mark came into force on December 12, 2002.

As of February 27, 2003, some sections of the *Tetrachloroethylene (Use in Dry Cleaning and Reporting Requirements) Regulations* under the *Canadian Environmental Protection Act, 1999* are in force. The sections on waste water and residue, transfer requirements, and reporting come into force on January 1, 2004.

Alberta Legislation

Bill 33, the *North Red Deer Water Authorization Act* passed third reading on December 3, 2002 and came into force the next day. The Bill authorizes a licence to be issued under the *Water Act* allowing the transfer of water from the South Saskatchewan River Basin to the North Saskatchewan River Basin. It denies any appeal of the licence to the Environmental Appeal Board. (See *News Brief*, Vol.17, No.4, p.7 – for further commentary on this Bill).

Manitoba Regulations

As of November 18, 2002, the *Riparian Property Tax Reduction Regulation*, Manitoba Regulation 194/2002, under *The Property Tax and Insulation Assistance Act* is in force. The tax reduction is "to promote the protection and restoration of riparian lands and waterways in agricultural areas; to improve water quality in Manitoba; and to recognize the contribution of taxpayers in promoting the protection and restoration of riparian land and waterways during [a three–year period beginning on January 1, 2003.]"

The Manitoba Government has registered a new *Water and Wastewater Facility Operators Regulation* under *The Environment Act*. Sections of Manitoba Regulation 77/2003 come into force on June 1, 2003 with most of the remainder doing so on September 1, 2003. Certain sections do not apply to a facility until September 1, 2006. .

Northwest Territories Regulations

The Department of Resources, Wildlife and Economic Development released a *Guideline for Ambient Air Quality Standards in the Northwest Territories: Sulphur Dioxide (SO_2), Ground Level Ozone (O_3), Total Suspended Particulate (TSP), Fine Particulate Matter ($PM_{2.5}$)* under the *Environmental Protection Act*. The Guideline, which took effect in December 2002, sets the standards for maximum concentrations of these substances in ambient air throughout the Northwest Territories. It can be accessed on the website <http://www.gov.nt.ca/RWED/eps/pdfs/ambient_airquality.pdf>.

The *Mine Health and Safety Regulations*, R-125-95, under the *Mine Health and Safety Act* have been amended by R-008-2003. The amendment Regulation came into force on February 28, 2003.

Cases and Enforcement Action...

The Alberta Court of Queen's Bench released its decision in the judicial review concerning the approval issued for a gravel pit operation. In *Court* v. *Alberta Environmental Appeal Board*, Justice McIntyre noted "the Board applied a patently unreasonable test, both as to timing and content, for determining the Applicant's standing." The Applicant was granted standing and the matter was returned to the Environmental Appeal Board.

■ **Dolores Noga**
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In Progress reports on selected environmental activity of the 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 <http://www.elc.ab.ca>.

Province Enacts Retroactive Criteria for EUB Consideration

The *Electric Utilities* Act, originally introduced as Bill 3 into the Alberta Legislature,[1] was passed during the Spring 2003 sitting and proclaimed in force by Order in Council effective June 1, 2003. Section 164(1) of the Act makes a consequential amendment to section 3(1) of the *Hydro and Electric Energy Act*.[2] The amended legislation clearly directs that where the Energy and Utilities Board is considering an application under section 11 for construction and operation of an electrical generating unit, or under section 18 for connection of a generating unit, it "shall not have regard to whether the generating unit is an economic source of electric energy in Alberta or to whether there is a need for the electric energy to be produced....". Subsection 3(2) specifically states that subsection 3(1)(c) applies to Board consideration of applications made after January 1, 1996. The question this article attempts to address is whether this amendment is valid according to the rules of statutory construction regarding retroactive application of legislation.

Presumption against retroactivity

There is a common law presumption that legislation is not intended to be retroactive because reaching into the past and declaring the law to be different from what it was violates the rule of law. In *Gustavson Drilling*, the Supreme Court of Canada stated that the "general rule is that statutes are not to be construed as having retrospective [retroactive] operation unless such a construction is expressly or by necessary implication required by the language of the Act".[3] Retroactive application is different from retrospective application in that the former deems the law to have been different from what it actually was when the facts occurred, and the latter is when the legislation looks back at the past events, but is prospective in its effects. In determining the intent of legislation, the courts would attempt to analyze the challenged provision to understand the scheme of the Act, the purpose of the amendment, and the impact of its application to the facts of the case.

Rebutting the presumption

The presumption against the retroactive application of legislation applies to cases where the language of the statute is ambiguous, and can be rebutted by express words or necessary implication.[4] Sullivan goes on to say that all that is required is some sufficient indication that the legislation is meant to apply not only to ongoing and future facts, but also to facts that are past.[5] Retroactive legislation will often state that it applies to designated facts occurring from or before a particular date or time. Because the presumption against retroactive application of legislation is strong, express provisions like this are often included in legislation, as is the case in the amendment to the *Hydro and Electric Energy Act*. The presumption against retroactivity may also be rebutted if the application of the legislation would serve a useful or desirable purpose. A court application to challenge the validity of a retroactive amendment could potentially argue against this.

Vested rights

There is also a presumption that the legislation should not be intended to apply in a manner that would interfere with a person's vested rights. Such rights include property rights, contractual rights, and rights to damages or other common law remedies that are more easily recognized. Such rights are usually identified at a specific point at when they arose and are said to belong to a claimant. However, outside of the traditional categories it is difficult to determine when an interest or expectation should be recognized as a vested or accrued right. The presumption however can be rebutted if there is evidence that the legislature intended that the legislation apply despite its interference with a vested right. Normally, the law should not be construed in such a way unless the language requires it. In each case where a challenge might accrue, the court would decide whether at the moment of repeal or replacement the individual's statutory claim was sufficiently defined and developed, and sufficiently in his or her possession to count as a vested right.[6] Interference with a vested right could be considered a violation of natural justice. An applicant who believes that the legislation violated a constitutional right could commence a Charter challenge.

In *Scott* v. *College of Physicians and Surgeons of Saskatchewan*, the Court of Appeal identified two criteria to distinguish vested from unvested rights.[7] The right must be personalized so that the individual is in a distinct legal position different from other members of society, and a step must have been taken or an event have occurred toward realization of the right. The claimant must have acted upon the claim so as to effectively make the right his own. Here there is potential for argument if an individual were to claim that the amended legislation was violating a vested right.

The *Electric Utilities Act* has clear and explicit language to rebut the presumption against retroactive application of legislation. There may be an opportunity to challenge the legislation if it could be proven that it would interfere with or deprive the applicant of a vested right. As the courts decide on a case by case basis, there is no certainty that the entitlement of a vested right will be recognized, despite any adverse effect the legislation may have.

■ **Keri Barringer**
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1 S.A. 2003, c. E-5.1.
2 R.S.A. 2000, c. H-16.
3 *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue – M.N.R.)* [1977] 1 S.C.R. 271
4 Ruth Sullivan, *Sullivan and Dreidger on the Construction of Statutes*, 4th Edition (Markham: Butterworths Canada, 2002) at 562.
5 *Ibid.*
6 *Ibid.* at 570.
7 (1992) 95 D.L.R. (4th) 70o, 18 W.A.C. 291 (Sask.C.A.).

Case Notes

Joint Panel Rejects Hydro Project on Precautionary Basis

Report of the EUB-NRCB Joint Review Panel: Glacier Power Ltd., Dunvegan Hydroelectric Project (25 March 2003) EUB Decision 2003-020 (Alberta Energy and Utilities Board and Alberta Natural Resources Conservation Board) EUB Application 2000198; NRCB Application No. 2000-1

A recent decision of a joint Alberta Energy and Utilities Board (AEUB) and Alberta Natural Resources Conservation Board (NRCB) review panel ("the joint panel") rejected a proposed hydroelectric project. While the decision is of interest in part because of the AEUB's record of very few project rejections, more significant is the joint panel's use of a precautionary approach in turning down the applications. Questions also arise with respect to the possible effect of the newly enacted *Electric Utilities Act*[1] on this decision.

Background

The proposed project was to construct and operate a 40-megawatt hydroelectric generation weir on the Peace River. An environmental impact assessment report was required under the *Environmental Protection and Enhancement Act*,[2] as were authorizations under the *Hydro and Electric Energy Act*[3] and the *Natural Resources Conservation Board Act*.[4] The joint panel was established by the AEUB and NRCB to deal with these applications.[5] Issues identified by the joint panel for the purposes of the review included effects of the proposed project on river ice buildup and potential flooding in the Town of Peace River; on annual construction of an ice bridge used by rural residents of the region; and on fisheries matters, including upstream and downstream passage of fish. Interveners included the federal government, BC Hydro, local municipalities, environmental organizations and First Nations communities. The joint panel ultimately denied the applications before both the AEUB and NRCB.

Infrequency of rejections

This decision is of interest because the past record of the AEUB in particular has been one of approval of virtually every energy-related application. The common practice of the AEUB has been to approve projects with a range of conditions attached, often covering a broad scope of matters from monitoring and reporting to public consultation.[6] While the AEUB has rejected some applications in the recent past, these have been relatively infrequent and often related to major problems with public consultation by the proponents.[7]

Precautionary approach

Perhaps the most significant aspect of this decision is the clearly precautionary approach taken by the joint panel, which is a somewhat novel approach thus far in Alberta. The precautionary principle, which has gained currency in international and domestic environmental law over the past decade, has been enunciated in different ways by legislators and decision-makers.[8] Federal legislation in Canada refers to the principle as one that prevents lack of full scientific certainty from being used as a reason to avoid taking preventive measures where there are threats of serious or irreversible environmental damage.[9] Alberta legislation generally does not provide any explicit enunciation or recognition of the precautionary principle; there are no statements regarding the principle in any of the statutes relevant to the joint panel's review and decision.

In reaching its decision to reject the applications, the joint panel, while not specifically mentioning the precautionary principle, relied heavily on evidentiary uncertainty and lack of quantification. The joint panel cited at least nine points of uncertainty, including operational constraints that could affect the project; claims of benefits to be provided by the project; risks to public safety; and mitigation measures.[10] Ultimately, the joint panel stated:

> The Panel has determined that significant uncertainty remains with respect to the relationship between the potential benefits and costs of the project. While the individual potential negative economic, social and environmental effects of the project, if they were to occur, are substantive in their own right, their cumulative effect clearly outweighs the social and economic benefits of the project to the local community, as well as to Albertans in general. The Panel is also not convinced by the available evidence that there are reasonable opportunities to ameliorate or mitigate these potential negative effects.[11]

Effect of new *Electric Utilities Act*

An unresolved matter related to this decision is the potential effect of the new *Electric Utilities Act*, passed by the Alberta Legislature in the spring 2003 sitting but not yet proclaimed. Section 164 of the new Act makes consequential amendments to the *Hydro and Electric Energy Act*, explicitly removing consideration of need for electricity generation from the AEUB's review of project applications and applying the amendment to applications considered by the AEUB after January 1, 1996, which would include this decision. The joint panel considered whether it could address need for the project in its review and determined that it should do so to achieve the public interest mandates of both the AEUB, which is directly affected by the amendment, and the NRCB, which is not subject to the same constraints.[12]

As the joint panel considered need for the project in its deliberations[13] and made reference to related elements in its findings,[14] it is arguable that once the new *Electric Utilities Act* is proclaimed, the proponent could seek a rehearing of the applications based on the amendment to the *Hydro and Electric Energy Act*. The amendment appears to be sufficiently clear in expressing the Legislature's intent to retroactively apply the provision to withstand challenge.[15] However, the Legislature may not have anticipated the difficulties that could arise in seeking to change decision-making criteria for matters that have already been decided by administrative tribunals.

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Case Notes

Appeal Court Addresses Municipal Powers Over Livestock Operations

Love v. *Flagstaff (County of) Subdivision and Development Appeal Board* (9 December 2002), Edmonton 0003-0393-AC and 0003-0394-AC (Alta. C.A.)

This case addressed the issue of conflicts between an application for development under a permitted use within municipal jurisdiction and a proposal for an intensive livestock operation (IAO). The Court considered how the intent of a municipal bylaw should be interpreted when there are conflicting land use development applications. The Appellants in this appeal challenged a decision of the Subdivision and Development Appeal Board (SDAB). The SDAB upheld the decision of the Development Authority (DA) in Flagstaff County to deny applications for permits to build residential homes. Each of the parties had applied to the DA for a permit to build a single family residential dwelling on their lands. This was a permitted use under the relevant County Bylaw, zoned as an agricultural district. The application by Taiwan Sugar for an IAO permit was not yet received when these applications were filed. At the same time that Appellants' applications were denied, Taiwan Sugar filed its incomplete application for the IAO permit. IAOs are a discretionary use under the Bylaw.

Status of the applications

The DA denied the Appellants' applications on the basis that the dwelling each wanted to build would be too close to the proposed IAO. This would breach the minimum setback rule as prescribed in the Code of Practice,[1] even though the Code does not expressly address who is responsible for providing the minimum setback when there are competing applications for a residence and an IAO on adjacent lands. The Bylaw was implicit in its determination that an IAO developer may include lands of adjacent landowners in determining if it has met the required minimum distance requirements, even when it precludes adjacent landowners from using the portion of their lands that fall in the setback area. The SDAB determined that on the date the DA decided on the Appellants' applications, the Taiwan Sugar application was 'proposed', and that both applications were properly refused for not meeting the required setback distances.

The Court's interpretation

The Court looked at whether the SDAB erred in its interpretation of the word 'proposed' under the Bylaw. It addressed two issues – at what point an application for an IAO is considered 'proposed' under the Bylaw, and the relevant date to determine whether a permitted use residential dwelling meets the minimum distance requirements of the Bylaw. The Court applied a 'purposive and contextual approach' in its interpretation as endorsed by the Supreme Court of Canada, and considered a range of alternative options for interpreting the meaning of 'proposed'. The Court reviewed Part 17 of the *Municipal Government Act*[2] (MGA) and the Municipal Development Plan for Flagstaff County. It determined the objectives of both were to encourage environmentally sound, sustainable agriculture and other forms of economic development while conserving and enhancing the County's rural character. It also considered the overall values that are critical components of planning law and practice in Alberta, including, "orderly and economic development, preservation of quality of life, respect for individual rights, and recognition of the limited extent to which the overall public interest may legitimately override individual rights".[3]

The Court concluded the permit issue date for the IAO is the actual date at which a project becomes 'proposed' for the purposes of the Bylaw. It suggested that, otherwise, if an IAO could attain 'proposed' status upon filing an incomplete application, this could lead to developers filing numerous incomplete applications to prevent adjacent landowners from filing their own development permit applications, where minimum setback requirements are at issue. It also emphasized that the Bylaw provides that the construction of a single family home is a permitted use, whereas the IAO is discretionary and potentially could never be approved. Anyone seeking a discretionary IAO permit is encouraged by the Municipal Development Plan to enter into public consultation with landowners. Developers can anticipate that adjacent property owners whose lands may be negatively affected by the minimum setback requirements may file a residential permitted use application to protect future development rights.

The Court considered that this process reflected an intention that the neighboring landowners have an opportunity to consider and exercise rights that attach to their lands prior to the issuance of an IAO permit. The Court also suggested that developers could mitigate the economic costs imposed by this scheme by negotiating with neighboring landowners to compensate them for future loss of right to construct a residence, or by selecting larger sites to satisfy the minimum setback requirements. Thus the Court said the rights of the permitted use applicant crystallized at the date of filing the permitted use application, thus requiring the single family residential permits to be issued.

The dissenting opinion

The dissenting opinion of the Court held that the purpose of the Bylaw was to provide land where all forms of agriculture can be carried on without interference by other incompatible land uses, allowing a development authority to refuse to issue a development permit for any land use which may limit or restrict existing or proposed agricultural operations. Justice Russell also stated that a narrow interpretation of 'proposed' could undermine such purposes, enabling landowners to defeat an IAO application that is planned, but not yet proposed, by 'rushing' to obtain residential dwelling development permits. The dissenting view held that the development of IAOs serves the public interest by providing economic benefits to the community as a whole, and that municipal development plans promote agriculture as an integral component of the regional economy.

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Action Update

Creative Sentencing

Part I - Overview

Introduction

It has almost been ten years since the proclamation of the Alberta *Environmental Protection and Enhancement Act* and the introduction of the innovative sentencing option that we now call creative sentencing. Creative sentencing has become a significant feature of almost every environmental prosecution as illustrated by the penalties imposed over the last ten years:

2002	**$502,423** - included $202,955 in creative sentencing orders
2001	**$419,500**[1] - included $163,000 in creative sentencing orders
2000	**$279,692** - included $232,200 in creative sentencing orders
1999	**$410,450** - included $103,750 in creative sentencing orders
August 1997 to December 31,1998	**$1,143,500** - included $401,580 in creative sentencing orders
April 1996 to July 1997	**$856,750** - included $253,000 in creative sentencing orders
September 1994 to March 31, 1996	**$83,850** (No creative sentencing orders as legislation allowing for such orders did not come into place until September 1993)
August 9, 1993 to September 1994	**$223,150** (No creative sentencing orders as legislation allowing for such orders did not come into place until September 1993)

With the benefit of this experience, Alberta Justice and Alberta Environment held a workshop in February 2002 involving various stakeholders in such projects, hoping to establish a formal framework for developing, selecting and monitoring creative sentencing projects. The group made a number of unanimous recommendations and by March 2003 all of those recommendations were implemented.

This paper addresses some of the questions raised in that workshop and which are frequently asked of the Crown:

- What is creative sentencing?
- What are the aims and goals of creative sentencing?
- How do the Courts approach creative sentencing?
- What are the limitations on such projects from the perspective of the Crown?
- What are the dangers inherent in creative sentencing?
- What does the future hold?

What is creative sentencing?

Section 234(1) of the *Environmental Protection and Enhancement Act* (the "Act") allows a judge sentencing a defendant for offences committed under that Act to take an innovative approach to sentencing by ordering that funds be dedicated to certain projects like research, education or improvements in industry standards. This is what has come to be referred to as "creative sentencing."

The proposed creative sentencing order must fall within the terms of section 234(1)(a) - (i) of the Act, or there is no jurisdiction for the judge to make such an order.
What is often forgotten is that the sentencing judge is the ultimate decision maker, not the parties who bring the idea for creative sentencing to the court. Only if the judge accepts the recommendations of the parties, do they become part of the sentencing order.

It must be understood that creative sentencing is part of the punishment of an environmental offender after a finding of guilt. While there are statutorily recognized diversion programs available for *Criminal Code* offences, creative sentencing does not fall into that category. Many offenders are under the misapprehension that creative sentencing is more akin to an out of court settlement than a sentence.

Creative sentencing is not an alternative source of funding for environmental groups. Each project arises from the unique circumstances of the case.

Finally, creative sentencing can never amount to extortion in the sense of exchanging creative sentencing projects for withdrawal of the charges.

Aims and goals

A theme that is repeated over and over again by the judiciary is that creative sentencing allows some good to come from bad, that something positive can be done after an environmental incident. Courts have described creative sentencing as "looking to the future" or as a way for defendants to help others in the same industry and in the same predicament to avoid committing further environmental offences. It is in this way that the creative sentence serves the interests of justice including the public interest.

How do the courts approach creative sentencing?

First, based on the decision of Judge Fradsham in *R. v. Van Waters and Rogers Ltd.*[2], the sentencing judge determines the appropriate total penalty based on the circumstances of the case.

(Continued on Page 10)

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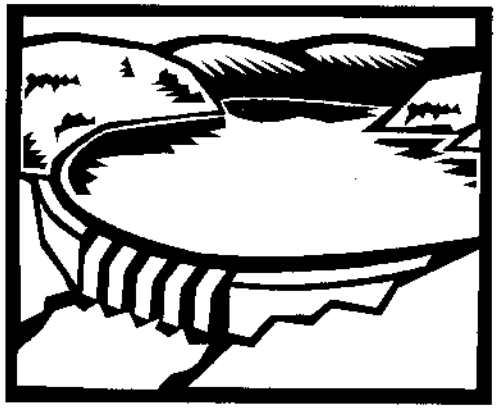
(Joint Panel Rejects Hydro Project . . Continued from Page 6)

1 *Electric Utilities Act*, S.A. 2003, c. E-5.1.
2 *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 41.
3 *Hydro and Electric Energy Act*, R.S.A. 2000, c. H-16, ss. 9-10, 13-15, 18.
4 *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3, s. 4.
5 The AEUB is authorized to participate in cooperative proceedings and joint panel reviews pursuant to s. 21 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10. The NRCB has the same authority pursuant to s. 22 of the *Natural Resources Conservation Board Act, ibid.*
6 Some examples of approvals with extensive conditions include: *Canadian 88 Energy Corp. Application to Drill a Level 4 Critical Sour Gas Well Lochend Field* (7 July 1999), Decision 99-16 (A.E.U.B.), Application No. 970473; *Epcor Generation Inc. and Epcor Power Development Corporation, 490-MW Genesee Power Plant Expansion* (21 December 2001), Decision 2001-114 (A.E.U.B.), Application No. 2001173; *TransAlta Energy Corporation, 900-MW Keephills Power Plant Expansion* (12 February 2002), Decision 2002-014 (A.E.U.B.), Application 2001290.
7 Some examples of rejections include: *Re Shell Canada Limited Application for a Well Licence, Shell PCF Ferrier 7-7-38-6W5, Ferrier Field* (20 March 2001), Decision 2001-9 (A.E.U.B.), Application 1042932; *Re Stampede Oils Inc. Application for a Well Licence, Turner Valley Field* (14 December 1999), Decision 99-30 (A.E.U.B.), Application 1031511.
8 For a general discussion of the precautionary principle, see Juli Abouchar, "The Precautionary Principle in Canada: The First Decade" (2002) 32:12 Environmental Law Reporter News & Analysis 11407.
9 See *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, preamble; *Pest Control Products Act*, S.C. 2002, c. 28, s. 20(2) (not yet proclaimed).
10 *Report of the EUB-NRCB Joint Review Panel, Glacier Power Ltd., Dunvegan Hydroelectric Project* (25 March 2003) EUB Decision 2003-020 (A.E.U.B. and N.R.C.B.) EUB Application 2000198; NRCB Application No. 2000-1, 57-59.
11 *Ibid.*, 60.
12 *Ibid.*, 5-7.
13 *Ibid.*, 7-11.
14 *Ibid.*, 57-58.
15 For further discussion of the effects of the amendment to the *Hydro and Electric Energy Act* by the new *Electric Utilities Act*, see "Province Enacts Retroactive Criteria for EUB Consideration" at p.5 of this issue.



(Appeal Court Addresses Municipal Powers. . .Continued from Page 7)

Conclusion

It should be noted that this application was commenced when the decisions to approve IAOs were made under the authority of municipalities under the MGA. Since January 2002, the Natural Resources Conservation Board has been granted authority under the *Agricultural Operation Practices Act* to grant approvals on new and expanding IAOs.[7] Municipal decision making powers have been reduced by this change in the law, although approval officers must deny a proposal if it is inconsistent with the municipal development plan.

■ **Keri Barringer**
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Environmental Law Centre

7 Alberta Agriculture, Food and Rural Development, *Code of Practice for Responsible Livestock Development and Manure Management* (Edmonton: Alberta Agriculture, Food and Rural Development, 2000).
8 R.S.A. 2000, c. M-26.
9 *Love v. Flagstaff (County of) Subdivision and Development Appeal Board* (9 December 2002), Edmonton 0003-0393-AC and 0003-0394-AC (Alta. C.A.) at 8
10 R.S.A. 2000, c. A-7.

(Creative Sentencing . . continued from Page 8)

Then, the judge considers whether and what amount of money should be available for creative sentencing projects.

Second, generally speaking, the case law suggests that one cannot deduct clean up costs from the total penalty. (*R.* v. *Van Waters & Rogers Ltd.*[3], *R.* v. *Chem-Security (Alberta) Ltd.*[4]) Third, the trend in Alberta has been a fifty-fifty split between a fine and creative sentencing as advocated by the provincial Crown. In other jurisdictions and at the federal level, the creative sentencing portion of the offence may constitute up to 90% of the total penalty.

Finally, courts have encouraged the Crown to seek an order under section 234(1)(g) to have the defendant pay for the costs of remedial or preventative action carried out by the Government.

What are the limitations on such projects from the perspective of the Crown?

The Crown has established guidelines as to when a recommendation will be made to the judge to consider creative sentencing and which types of projects and groups should be eligible for creative sentencing funds. These guidelines were initially based in part upon the State of California experience where creative sentencing has been an important feature in environmental sentencing for over twenty years. Alberta has since developed its own approach to creative sentencing.

The Alberta experience

Judicial commentary on creative sentencing, Crown experience in dealing with these sentences, and a survey conducted after the fact to judge the success of each particular project has pointed to two major factors that tend to affect the success of a creative sentence from the Crown's point of view:

1. The most successful projects attempted to address the root cause of the offence.

2. The least successful projects were those where the accused was not truly remorseful, considered creative sentencing to be the lesser of two evils, and continued to take the position that they should not have been convicted in the first place.

Importantly, to date there have not been any repeat offenders in cases where creative sentencing was imposed.

Notwithstanding their popularity and impact, these projects are hugely labor intensive, requiring skills not found in a single individual. There tend to be technical questions that arise in assessing the appropriateness of a project that require an expert's assessment. Effective (and considerable) investigation is necessary in order to determine whether the defendant is actually gaining a secret benefit by funding a project. Someone with the ability and information necessary to do an audit is required to determine whether in fact, the money has been spent according to the terms of the order.

These experiences and the substantial dollar value associated with these projects prompted the Assistant Deputy Minister for Alberta Justice to hold the February 2002 workshop. Provincial prosecutors, Alberta Environment, federal prosecutors, Environment Canada, defense counsel, and past and potential recipients of creative sentencing funds were all represented. At the conclusion of the two-day workshop the participants made a number of unanimous recommendations. Since some of these recommendations required additional manpower, Alberta Justice, Alberta Treasury and Alberta Environment worked together to ensure that all of the recommendations of the workshop were implemented.

Part II of this article will be printed in the next issue of *News Brief*.

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1 Including provincial files prosecuted by the federal Department of Justice because of conflicts.
2 (3 June 1998) Calgary 61444667P1 0301 (Alta. Prov. Ct.).
3 *Ibid.*
4 (1998) 29 C.E.L.R. (N.S.) 60 (Alta. Prov. Ct.).

By Gavin Fitch, *Rooney Prentice*

Making the Most of Your Environmental Lawyer

So you have an environmental problem. Maybe an oil company wants to drill a sour gas well across your fence line. Maybe you discover groundwater beneath your property has been contaminated by gasoline from leaky underground storage tanks beneath the service station on the corner. These are but two examples of the kinds of environmental issues unsuspecting landowners in Alberta find themselves faced with every day. So what do you do?

Many people will seek legal advice. One of the first things you'll have to discuss with your lawyer, of course, is money: how much is this going to cost? This is particularly important in environmental law, because depending on your problem, there may be funding available to cover your legal costs. Funding may be available, for instance, in the first example used above (a company wants to drill a well) through the Alberta Energy and Utilities Board's local intervener funding process. The Natural Resources Conservation Board and, to a lesser extent, the Environmental Appeal Board, also have processes in place for landowners to claim funding.

In all these cases, funding may be available because a company proposes to build an industrial facility which will benefit the province generally as economic development (royalties and taxes) but whose impacts will be felt primarily by the one or more families who live closest to the proposed facility. The provision of funding is intended to "level the playing field".

Many environmental issues involve more than just a single family or landowner. In such cases, there is power in numbers. In our experience, one of the ways clients can help their lawyer most is to organize into a cohesive, committed group. This has several potential benefits. First, both companies and the government tend to take more notice of organized landowner or resident groups. Second, there are more people to put to work. One of the best ways to keep legal costs down is to do as much of the work as possible yourself. There are many things lawyers do that clients can do just as easily and far more economically: dealing with the government and other public bodies (civil servants will often talk more freely to an "average citizen"—particularly one who appears to be the victim of some environmental injustice—than to a lawyer); identifying and assembling documents that may be relevant to the case; identifying and contacting potential witnesses; etc.

The one potential pitfall of organizing into a group is too many chefs spoiling the broth. Groups really do have to be organized; even informal ones need to have an "executive" responsible for communicating in an orderly way with the lawyer. If the lawyer is answering 20 calls a day from the client group, the efficiencies and cost-savings of forming the group will be lost.

One of the most important things the client in an environmental case needs to do, as early in the process as possible, is define his or her objectives. Environmental cases are usually more complex than simple fights over money. In the case of the gas well, are you trying to stop it altogether, or simply have the proponent conduct its activity more responsibly or with fewer impacts? The answer to this question will have a large bearing on the strategy your lawyer will follow in developing your case.

In the case of the contaminated groundwater, do you want your property restored (this may depend on whether it can be restored at all and, if it can, how long it will take and at what cost) or do you want compensation? If you want it restored, one part of the strategy may be to convince Alberta Environment to get involved. Alberta Environment has broad powers to order polluters to clean up contamination, whether recent or historical. But there are many contaminated sites in Alberta and sometimes Alberta Environment needs some "convincing" to get involved. Getting them involved can have real benefits in that the day-to-day work of keeping the pressure on the polluter becomes the government's responsibility. The job of you and your lawyer then becomes keeping pressure on the government, if it's needed.

If your principal objective is compensation, then you are headed for civil litigation (assuming you cannot negotiate a settlement with the company). Environmental litigation is usually lengthy, complex and expensive because in order to "prove" your case, you must present scientific or "expert" evidence to the court. Therefore, litigation should be viewed as a last resort.

Should you have to hire a lawyer because of an environmental problem (or any other for that matter), remember, it's your case. Be involved. Ask how you can help. A committed, engaged client can make the lawyer's job much easier.

Receding Lakes and Property Lines – Subject to Change?

Dear Staff Counsel:
I own a cottage on lakefront property. Over the last few years, the lake has receded due to a number of factors, including industrial activity, low precipitation and above average temperatures for several years in a row. Is the exposed lakebed now my property? If not, who owns it?

Sincerely,
Confused Cottager

Dear Confused Cottager:

Owners of property adjacent to a water body or watercourse are called "riparian owners". In general, riparian owners have a right to accreted lands, which are lands exposed as a result of the gradual, imperceptible retreat of waters, normally through natural processes. This process is called accretion. By the same token, riparian ownership is subject to the loss of land through erosion caused by water. There is no compensation for loss through erosion.

The provincial Crown is the legal owner of the beds and shores of all permanent, naturally occurring water bodies, and all naturally occurring watercourses.[1] This means that these areas are provincially-owned public land. When a riparian owner's land increases through accretion, the provincial Crown's ownership of the bed and shore decreases. When a riparian owner loses land through erosion, there is a corresponding increase in the bed and shore belonging to the provincial Crown.

However, it is fairly difficult for riparian owners to establish accretion. The following summarizes the legal requirements:

1. Your title documents (certificate of title, registered subdivision plan) must make it clear that the water body or watercourse at issue is a legal boundary of your property. For example, if your registered subdivision plan indicates the boundary at issue as a straight line (i.e. not the water body itself) and there is nothing else to indicate the water as boundary, accretion cannot be established.[2]

2. The landowner must own the land bordering on the land claimed to be accreted. So, for example, if municipal reserve (land) separates your lot from the watercourse or water body, there can be no accretion to the lot. By the same reasoning, the formation of islands cannot constitute accretion.[3]

3. To constitute accretion, the change must be gradual and imperceptible.[4] For example, a quick change in a watercourse or water body, called an avulsion, does not constitute accretion.

4. A leading case states that accretion can only result from the action of water in the ordinary course of the operation of nature.[5] However, the same case also indicates that

> "...the fact that the increase is brought about in whole or in part by the water, as the result of the employment of artificial means, does not prevent it from being a true accretion, provided the artificial means are employed lawfully and not with the intention of producing an accretion...."[6]

Amendment to Title

If you feel that you can satisfy the above requirements, you may apply to the Registrar of Land Titles to amend the property description on title to reflect the current location of the natural boundary.[7] You will need to review the *Land Titles Procedure Manual, Procedure #SUR-12: Surveys – Natural Boundary Changes*, which is available through the Land Titles Office or on-line.[8]

If you have questions regarding the procedure for having the Registrar amend your title, you may also contact the Land Titles Office directly at (780) 427-2742.

(This article is adapted from A. Kwasniak, *Alberta's Wetlands: A Law and Policy Guide*, available through the Environmental Law Centre.)

Prepared by:
James Mallet
Staff Counsel

1 *Public Lands Act*, R.S.A. 2000, c. P-40, s. 3.
2 *Pitt v. Red Deer (City of)* (2000) 271 A.R. 160, 2000 ABCA 281 (Q.B.); *Nastajus* v. *North Alta. Land Registration Dist.* (1989) 64 Alta. L.R. (2d) 300 (sub nom. *Nastajus* v. *Edmonton Beach (Summer Village)*) 92 A.R. 363 (C.A.); *Clarke* v. *Edmonton (City)* [1930] S.C.R. 137, [1929] 4 D.L.R. 1010.
3 A newly formed island will normally belong to the owner of the lakebed: *Re Bulman* (1966) 57 D.L.R. (2d) 658 at 662, 56 W.W.R. 225 (B.C.S.C.). In Alberta, the provincial Crown is the owner of most beds and shores: see *supra* note 1.
4 *Chuckry* v. *The Queen*, [1973] S.C.R. 694, 35 D.L.R. (3d) 607.
5 *Clarke* v. *Edmonton (City)*, *supra* note 1 at 149.
6 *Ibid*
7 *Land Titles Act*, R.S.A. 2000, c. L-4, s. 89.
8 Alberta Registries, *Land Titles Procedure Manual, Procedure #SUR-12: Surveys – Natural Boundary Changes* (Edmonton: Alberta Registries, 2002). This document is available on-line at <http://www3.gov.ab.ca/gs/pdf/ltmanual/SUR-12.pdf>

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