News Brief
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Regulatory Reform Needed for Contaminated Sites

In This Issue

Ten years have passed since the *Environmental Protection and Enhancement Act* (EPEA) came into effect.[1] When it was enacted, one of EPEA's novel features was the inclusion of provisions aimed at remediation of contaminated sites. These provisions, developed following extensive policy development and stakeholder consultation in both the provincial and national arenas, were intended to give Alberta Environment a means to deal with contamination, ensuring environmental protection while making polluters pay and achieving fairness for those involved with contaminated land.

A decade later, EPEA's contaminated sites provisions have scarcely been used,[2] while a range of parties vigorously litigate regarding regulatory tools and allocation of liability for remediation of contamination. Jurisprudence from both the Environmental Appeal Board and the Court of Queen's Bench has confirmed Alberta Environment's ability to use different regulatory tools to address contamination matters, but has given little guidance with respect to circumstances in which the regulators should resort to use of the contaminated sites provisions.[3] In recent years, other Canadian jurisdictions have undertaken policy and legislative initiatives aimed at revising existing contaminated sites requirements and encouraging the redevelopment of "brownfield" sites (sites that have been remediated).[4] As well, municipalities in Alberta have been lobbying for initiatives to address brownfield matters.[5]

Given all of these factors, the time may well be ripe for Alberta to undertake statutory reform in relation to contaminated land. This article offers some suggestions for possible legislative change, focusing on Part 5, Division 2 of EPEA, which contains the contaminated sites provisions. In a previous article, it was suggested that legislative reform take the route of development of criteria for use of the contaminated sites provisions as compared to use of EPEA's substance release provisions, which have been Alberta Environment's regulatory tool of choice for requiring remediation of contamination.[6] However, such a step would likely be a stop-gap measure and would not solve the deeper concerns regarding allocation of liability and utility of the administrative process.

Option one – eliminate the problem

One legislative option is to repeal Part 5, Division 2 of EPEA and rely wholly upon the substance release provisions in Part 5, Division 1 to deal with contaminated sites. This generally reflects Alberta Environment's current practice. Such a step would offer the advantage of clarifying the regulatory tools available for dealing with contamination, ideally eliminating litigation related to the choice of those tools made by Alberta Environment. Part 5, Division 1 also offers a much more streamlined and straightforward process for issuing orders and requiring remediation, with a lower threshold for action (adverse effect rather than significant adverse effect).

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However, this option does have drawbacks. One of the chief problems of this approach would be the resulting inconsistency with recommendations of both the Contaminated Sites Liability Issues Task Force, which championed fairness as a basic principle of Alberta's contaminated sites legislation,[7] and the Canadian Council of Ministers of the Environment Core Group on Contaminated Site Liability, which also saw fairness as an important element of such legislation.[8] Wholesale elimination of Part 5, Division 2 would also result in the loss of some useful regulatory elements, such as a broader range of responsible persons, public notice and participation, and possible compensation for persons affected by contaminated sites. However, some or all of these elements could be retained by making amendments to Part 5, Division 1 to incorporate them into the substance release provisions. Such amendments could be specifically limited to contaminated sites matters only.

Option two – separate remediation and liability

Another legislative option would be to amend Part 5, Division 2 to take the determination and allocation of liability out of the regulator's hands and shift that task to the courts. This could be achieved by retaining and clarifying statutory criteria for liability allocation and directing that determination of liability be made by the Alberta courts, either by separate civil action or through an application under EPEA. This approach offers some attractive advantages, foremost of which is the removal of a significant roadblock to the use of Part 5, Division 2. Allocation of liability is a matter that is commonly dealt with by the courts, while arguably Alberta Environment is not equipped, in terms of personnel or resources, to make such determinations. Such an approach is a common-sense means of having elements of contaminated site remediation dealt with by those bodies best suited to do so, with Alberta Environment addressing technical requirements and the courts determining liability allocation. It is also consistent with suggestions made by the Contaminated Sites Liability Issues Task Force regarding the separation of remediation and liability.[9]

It is possible that this approach might see parties try to delay remediation until liability has been determined by the courts. This could be avoided in part by clearly separating remediation and liability within the statutory provisions and including a specific statutory requirement that remediation proceed regardless of the status of liability determination. To deal with any hardships that could arise in this vein, a fund could be created, with repayment provisions, to enable parties to carry out remediation prior to liability being allocated.

Conclusion

Regardless of the route to be taken, it is clear that some form of legislative or regulatory reform is required to deal with the difficulties inherent in Alberta's contaminated sites regime. Ideally such reform will be undertaken by Alberta Environment in the near future and will include opportunities for public participation and input. Without such reform, it seems likely that we will see further disputes and litigation in the future over selection of regulatory tools to deal with contaminated sites.

■ **Cindy Chiasson**
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1 R.S.A. 2000, c. E-12
2 Since EPEA came into effect, Alberta Environment has designated four contaminated sites and has not issued any contaminated sites environmental protection orders (Environmental Enforcement Historical Search Service, Environmental Law Centre).
3 *Re McColl-Frontenac Inc.* (2001) 44 C.E.L.R. (N.S.) 114 (Ab. E.A.B.); *Re Imperial Oil Ltd.* (2001) 42 C.E.L.R. (N.S.) 209 (Ab. E.A.B.); *Legal Oil and Gas Ltd. v. Alberta (Minister of Environment)* (2000) 34 C.E.L.R. (N.S.) 303 (Ab. Q.B.); *McColl-Frontenac Inc. v. Alberta (Minister of Environment)* 2003 ABQB 303; *Imperial Oil Limited v. Alberta (Minister of Environment)* 2003 ABQB 388.
4 See Ontario's *Environmental Protection Act*, R.S.O. 1990, c. E-19, Parts XV.1 and XV.2; Quebec's *An Act to amend the Environment Quality Act and other legislative provisions with regard to land protection and rehabilitation*, S.Q. 2002, c. 11; and British Columbia's Bill 57, *Environmental Management Act*, 4th Sess., 37th Parl., British Columbia, 2003.
6 Alberta Urban Municipalities Association, Resolution No. A-5, *Brownfields Redevelopment Legislative Review* (2001).
7 Cindy Chiasson, "Direction Needed for Regulatory Remediation of Contamination" *Environmental Law Centre News Brief* 17:3 (2002) 1 at 2.
8 Contaminated Sites Liability Issues Task Force, *Final Report to Minister of the Environment* (Edmonton: Alberta Environment, 1992).
9 Canadian Council of Ministers of the Environment, Core Group on Contaminated Site Liability, *Contaminated Site Liability Report: Recommended Principles for a Consistent Approach Across Canada* (Winnipeg: Canadian Council of Ministers of the Environment, 1993).
9 *Supra* note 7 at 7

Forestry Case Sets Precedent for Duty to Consult

Haida Nation v. B.C. and Weyerhaueser [2002] 2 C.N.L.R. 121 and (2002) 216 D.L.R. (4th) 1 (B.C.C.A.)

A recent decision by the British Columbia Court of Appeal has set new precedents regarding the respective duties of the Crown and third parties to consult with First Nations before undertaking activities which may infringe upon aboriginal rights or title.

Facts

The Haida Nation applied for a judicial review of decisions by the Province of British Columbia (the Crown) to make changes to a tree farm license (the License) that permits logging operations on lands over which the Haida were claiming aboriginal rights and title. The Crown did not consult with the Haida Nation before replacing and transferring the License to Weyerhaeuser, even though it knew of the Haida's claim.[1] The British Columbia Supreme Court held that the Crown had a moral, but not a legal, duty of consultation to the Haida Nation. The Haida appealed to the British Columbia Court of Appeal.

The Crown's duty to consult

In its original reasons for judgment, the Court of Appeal addressed two central issues. The first issue pertained to the Crown's duty to consult. In a unanimous decision, the Court overturned the lower judgment and held that the Crown's duty to consult with the Haida Nation was triggered as soon as the Haida established a reasonably founded *prima facie* claim of aboriginal title.[2] It was therefore not necessary for the Haida to prove aboriginal title in court for the Crown's duty to consult to be engaged.

In making this finding, the Court relied on another recent British Columbia Court of Appeal decision, *Taku River Tlingit First Nation v. Ringstad*, which held that the "special trust relationship" between the Crown and aboriginal peoples had been breached through the Crown's refusal to consult with the Tlingit First Nation until the Tlingit had proven their aboriginal rights and title in court.[3]

Third party duty to consult

In the original reasons for judgment, the Court also held that Weyerhaeuser had a legally enforceable duty to consult with the Haida Nation, and found both Weyerhaeuser and the Crown to be in breach of their "enforceable, legal and equitable duties to the Haida people."[4]

Neither the Haida Nation nor Weyerhaeuser had presented arguments during the Court of Appeal hearing with respect to Weyerhaeuser's duty to consult with the Haida. Weyerhaeuser objected to the Court making a finding that had not been directly pleaded by the parties and was granted an oral hearing to make arguments challenging both the Court's jurisdiction and the finding on the duty to consult.

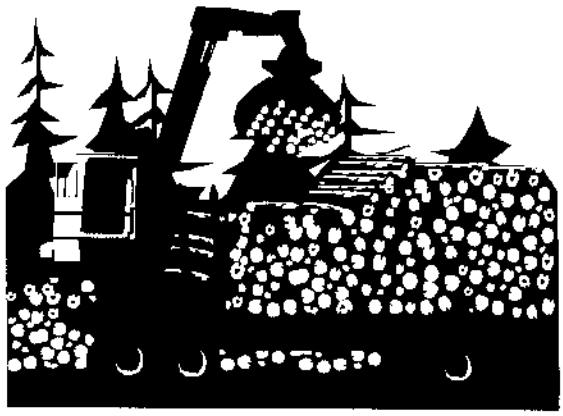
Sources of third party duty to consult

The Court's additional reasons for judgment included two separate opinions upholding a duty for Weyerhaeuser to consult and a dissent finding no such duty.

The Court identified four sources of Weyerhaeuser's duty to consult with the Haida.

- Weyerhaeuser had a statutory duty to consult, pursuant to certain dispositions of the *Forest Act*.
- Weyerhaeuser's duty of consultation arose from "its opportunity to put up a defense of justification" for any claim against it with respect to *prima facie* infringements of aboriginal rights or title.[5] The defense of justification had previously only been available to the Crown.
- The Crown's breach of its duties to the Haida caused Weyerhaeuser to receive a license that "suffered from a fundamental legal defect."[6] In the absence of a declaration of invalidity, this defect could only be remedied though consultation by both the Crown and Weyerhaeuser.[7]
- Weyerhaeuser knew or should have known that the Crown was breaching its own "continuing and ever present"[8] fiduciary duty to consult. Weyerhaeuser was therefore in "knowing receipt" of a License that was "clogged" or "encumbered" by the Crown's breach.[9] As a result, Weyerhaeuser was held to be a constructive trustee, "owing a third party fiduciary duty to the Haida people",[10] separate from the Crown's duty.[11] Furthermore, as the Crown exercises no control over Weyerhaeuser's day-to-day logging operations, Weyerhaeuser was also held to bear an additional duty to consult with the Haida with respect to infringements of aboriginal title and aboriginal rights resulting from those operations.[12]

The Crown and Weyerhaeuser have since received leave to appeal the case to the Supreme Court of Canada.



Implications

The B.C. Court of Appeal's decision in *Taku River* is also under appeal to the Supreme Court. Should the Supreme Court decide to overturn *Taku River*, it would also effectively be overturning the *Haida* decision.

(Continued on Page 5)

In Progress

In the Legislature...

Federal Regulations

As of July 24, 2003, the *Solvent Degreasing Regulations* under the *Canadian Environmental Protection Act, 1999* are in force. The Regulations are intended to reduce releases of trichloroethylene and tetrachloroethylene.

Alberta Legislation

Effective July 22, 2003, a new *Nuisance and General Sanitation Regulation* is in force under the *Public Health Act*. AR 243/2003 repeals AR 242/85 and expires on September 1, 2012 to ensure a review.

Effective on October 1, 2003, the *Conservation and Reclamation Regulation*, AR 115/93, will be amended by AR 247/2003. The amendment replaces sections of the Regulation pertaining to standards and codes of practice, to the application for reclamation certificate, and to operator liability after a reclamation certificate is issued.

Except for s.4, the *Agricultural Dispositions Statutes Amendment Act, 2003* was proclaimed in force on July 10, 2003. A number of regulations came into force along with it, including AR 226/2003, the *Dispositions and Fees Amendment Regulation*, AR 227/2003, the *Exploration Dispute Resolution Regulation*, and AR 228/2003, the *Recreational Access Regulation*.

AR 190/2003 amends the *Oil and Gas Conservation Regulations*, AR 151/71, as of June 12, 2003. The amendment addresses emergency preparedness and response. An amendment addressing emergency preparedness and response was also made to the *Pipeline Regulation*, AR 122/87. The amendment regulation, AR 192/2003 is in force as of June 12, 2003.

Manitoba Legislation

As of July 18, 2003, there is a new regulation under *The Pesticides and Fertilizers Control Act*. It is the *Prescribed Spraying Equipment and Controlled Products Regulation*, Man. Reg. 119/2003.

Cases and Enforcement Action...

Alberta Environment issued an Enforcement Order under the *Environmental Protection and Enhancement Act* to RD Flush Systems Ltd., as registered owner, and Jacob Martens, director, of a tanker truck washing facility in Red Deer. The facility had a registration under the *Code of Practice for Tanker Truck Washing Facilities* and a registration under *the Code of Practice for Compost Facilities*. The Order was issued after investigators determined the Company was contravening their Registration in a number of ways in violation of the *Environmental Protection and Enhancement Act*, the *Waste Control Regulation*, the *Code of Practice for Tanker Truck Washing Facilities*, and the *Code of Practice for Compost Facilities*. The Order suspends the Registration re the compost facility, and requires immediate compliance with *the Code of Practice for Tanker Truck Washing Facilities*. The Order also requires that the collected hazardous waste be removed and disposed of at an approved waste management facility, that a new plan be submitted and approved noting how the Company will comply with the *Waste Control Regulation* in the future, that testing be done to determine the extent of contamination of the area, and that a remediation plan be submitted, approved, and implemented.

Alberta Environment issued an Enforcement Order to Hannah Transport Ltd., Brian Hannah, and 811319 Alberta Ltd. of Drumheller and Acme, Alberta. The Order pertains to the improper storage of hazardous wastes in violation of s.11 of the *Waste Control Regulation*. The Order requires that the site be secured with a locked security fence, that an earthen berm be constructed to provide containment for the leaking substances, and that a plan be developed to ensure the site meets all the requirements of the *Waste Control Regulation*, the *Activities Designation Regulation*, and the *Environmental Protection and Enhancement Act*. The Order requires the work be done according to an approved schedule of implementation. The substances involved were transported from British Columbia where a court order had been issued for violation of the *Special Waste Regulation*.

PrimeWest Energy Inc., operating at or near Carstairs, was sentenced to a fine of $25,000 and a Creative Sentence Order of $75,000, after the Company pled guilty to release of a substance in an amount that causes or may cause a significant adverse effect, contrary to s. 98(2) of the *Environmental Protection and Enhancement Act*. The Creative Sentence Order will be directed towards funding of a habitat restoration project in the Falls Creek Reclamation Project.

A British Columbia Provincial Court Judge ordered Wie-Bet-Ter Holsteins Inc. of Chilliwack to pay a $1,000 fine and $6,000 to the Habitat Conservation Trust Fund after the company pled guilty to a charge under the *Waste Management Act* related to improper spreading of manure near a drinking water source.

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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>.

(Forestry Case Sets Precedent. . . (Continued from Page 3)

The impact of a decision to affirm *Haida* would depend on the basis upon which the Supreme Court found a third-party duty to consult. Should, for example, it find that Weyerhaeuser had a statutory duty to consult, the impact of the decision would be limited to British Columbia and to provinces with similar legislation. By contrast, a decision which endorsed the principles of knowing receipt could have the effect of imposing duties on third parties in every instance where they have benefited from the Crown's breach of its own fiduciary duty to consult.

Furthermore, should the Supreme Court hold that third parties such as Weyerhaeuser have a duty to consult with First Nations, it will likely not resolve the question of what specific steps a third party must take to demonstrate that it has fulfilled that duty. Although the Court of Appeal stated that "employing Haida people in [Weyerhaeuser's] operations, or the sharing of economic opportunities" would be a necessary part of Weyerhaeuser's duty, it declined to exhaustively delineate its content or scope.

It is also notable that the Haida were able to obtain a declaration of Weyerhaeuser's duty to consult through the procedural avenue of judicial review, as it is less costly than traditional litigation, and could provide an alternate means of directly challenging actions taken by industry that infringe on aboriginal rights and title.[13] Indeed, this procedural precedent could have the greatest long-term impact with respect to the capacity of First Nations to assert and protect their aboriginal rights and interests through the court system.

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1 *Haida Nation* v. *B.C. and Weyerhaeuser*, [2002] 2 C.N.L.R. 121, 2002 BCCA 147, para. 21
2 *Ibid.*, para. 49
3 *Taku River Tlingit First Nation* v. *Ringstad*, (2002) 98 B.C.L.R. (3d) 16, 2002 BCCA 59.
4 *Supra* note 1, para. 52.
5 *Haida Nation* v. *B.C. and Weyerhaeuser*, (2002) 216 D.L.R. (4th) 1, 2002 BCCA 462, para. 101.
6 *Ibid.*, para. 115.
7 *Ibid.*, para. 123.
8 *Ibid.*, para. 65
9 *Ibid.*
10 *Ibid.*, para. 72.
11 *Ibid.*, para. 103
12 *Ibid.*, para. 87
13 From materials provided to the Environmental Law Centre from the National Aboriginal Forestry Association.

Case Notes

Costs Awarded to Citizens in Inland Cement Appeal

Maga et al. v. Director, Northern Region, Regional Services, Alberta Environment re: Inland Cement Limited (17 January 2003) Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-R (A.E.A.B.).

The Environmental Appeal Board (the Board) recently awarded partial costs to the Appellants in their appeal of Inland Cement Limited's (Inland) amending approval for its cement manufacturing plant in north Edmonton.[1] The amendment was granted in May, 2002, by Alberta Environment, and permitted Inland to use coal instead of natural gas as a fuel source at the plant.

Applications for costs were made by the Edmonton Friends of the North Environmental Society (EFONES) and the Edmonton Federation of Community Leagues (EFCL), both also representing several individual appellants. Mr. Neil Hayes, an unrepresented appellant, also brought an application for costs.

The Board has broad discretion under section 96 of the *Environmental Protection and Enhancement Act* [2] (EPEA) to "award costs of and incidental to any proceedings before it....". However, the Board may only consider costs that are "directly and primarily related to

a) the matters contained in the notice of appeal, and

b) the preparation and presentation of the party's submission."[3]

If a costs item is found to satisfy these requirements, the Board will evaluate it against the costs criteria set out in section 20 of the *Environmental Appeal Board Regulation* ("Regulation").[4] Of these criteria, the Board has stressed that a key factor in whether costs will be awarded is their connection to evidence or argument that substantially contributed to the hearing. The Board is also guided by the purposes of EPEA, set out in section 2 of the Act.

The Board is not bound by the "loser pays" principle generally relied on by the courts. Instead, the Board considers the public interest in a costs award, examines the reasonableness of the request, and then makes a determination with reference to the provisions of EPEA and the Regulation. The Board has stressed the responsibility of all citizens for environmental protection and that, as a starting point, costs are the responsibility of the individual parties.[5]

The unrepresented appellant

Mr. Neil Hayes' claim for costs relating to preparation for the hearing was rejected, as was his claim for time taken off work to attend the hearing. The Board considered these costs to be a "routine and necessary part of being appellant."[6] The Board awarded Mr. Hayes his out of pocket expenses, which were less than 3% of his total claim.

The Board also stressed that costs must be properly documented, and the basis for the calculation explained, before an award will be considered.

The experts

The Board rejected costs claims for expert evidence in all but two cases. Failure to address the issues under appeal, and in one case a lack of credibility, were key in the Board's determination that much of the evidence had not significantly contributed to the appeal.[7]

An interesting issue arose with respect to two witnesses who testified for EFONES. Ms. Goodwin and Mr. Darwish had earlier filed notices of appeal, but then withdrew them and allowed EFONES to represent them. At the hearing they testified as witnesses. Ms. Goodwin as a medical scientist and Mr. Darwish as an accountant, and claimed costs for their involvement in the proceedings. The Board stated that their evidence was not expert and did not contribute significantly to the Board's decision. However, the Board went on to state:

> The fact that [Ms. Goodwin and Mr. Darwish] filed Notices of Appeal makes it clear that they have a personal stake in the matter, and as a result, the Board expects them to participate in the appeals, including using their professional skills to assist in the presentation of the appeal.[8]

The lawyers

At the appeal hearing, counsel for EFONES and counsel for EFCL divided the issues to be addressed before the Board. The Board acknowledged the efficiency of this approach and the significant contributions made by counsel for the appellants, and awarded partial legal costs to both groups. The Board stressed that counsel had raised significant issues, focused the presentation of clients, and made the hearing more efficient.

The Board reiterated that it is not appropriate to base its costs awards on a solicitor and client approach. Rather, costs are awarded based on what it considers to be a reasonable allowance for hearing and preparation time, modified to reflect the administrative and regulatory environment and other criteria that apply before the Board.[9]

The Board allowed additional costs to reflect the effectiveness of counsel for the EFCL in presenting and explaining complicated and technical evidence.

Conclusions

Only in a very few appeals has the Board made an award of costs. The Inland costs decision, along with last year's costs decision in the Lafarge appeal,[10] indicate that the Board is more willing to award some costs where the issues are of a complex, technical nature. Also important to these costs awards was the effectiveness of counsel in streamlining the hearing, presenting and explaining evidence, and focusing clients and witnesses.

Case Notes

Judicial Review Finds EAB Patently Unreasonable

Court v. Alberta Environmental Appeal Board, 2003 ABQB 456.

Introduction

In 2001, Alberta Environment (the Director) issued an Approval to Lafarge Canada Inc. (the Approval Holder), to open, operate, and reclaim a sand and gravel pit in the Municipal District of Rocky View, Alberta. The Director's decision was appealed by Linda Court (the Appellant) to the Environmental Appeal Board (EAB). The Appellant had previously filed a Statement of Concern with the Director and had been found by the Director to be directly affected.

The Approval Holder and the Director challenged the directly affected status of the Appellant. The EAB determined that the substantive issues which would be heard at the hearing were inextricably linked to determining the preliminary issue of standing. The decision on directly affected was deferred until the hearing was conducted. The Board also stated that it was not bound by the Director's decision that the Appellant had directly affected status. At the end of the hearing the EAB decided that the Appellant was not directly affected and dismissed the appeal.[1] The decision was judicially reviewed by Justice McIntyre of the Court of Queen's Bench, who determined that the EAB's decision was 'patently unreasonable'. The Court determined that the Appellant was entitled to be granted standing as a directly affected person and remitted the matter back to the EAB.

Issues

The EAB decided that the effect of dust and other pollutants, noise, and cumulative effects from the Approval Holder's operation were the issues it would rule on at the hearing. The EAB was clear that issues regarding other gravel operations in the area were not before them. The EAB was also clear that the issue of the directly affected status of the Appellant was a key preliminary issue and would addressed at the hearing. It stressed that the cumulative effects of a project were insufficient to form the basis for directly affected status. It would be looking for a 'direct nexus' between the Approval and the impacts asserted by the Appellant as the foundation for standing.

Hearing and decision

In determining the Appellant was not directly affected the EAB considered the principal test for directly affected as stated in *Kostuch*.[2] That is, the Appellant must show a personal interest that is directly impacted by the approval granted, beyond the broad interest of all Albertans for general environmental protection goals. Other principles considered included whether the person's interest is supported by the statute in question, and whether there is a balance between environmental and economic interests. The EAB determined that the Appellant's real concern was the impact of other existing gravel operations in the area, and that there was no direct connection between these concerns and the matter of the appeal.

The EAB also determined that the Approval Holder's operation would directly and indirectly affect the area in which it operates, and the effects would be cumulative. It reiterated however, that the cumulative impact of the operation in conjunction with and primarily due to the existing operations was insufficient to grant the Appellant standing. They did not find from the evidence presented that dust and other pollutants, or noise, would directly affect the Appellant in a way that was rationally connected to the Approval issued.

The EAB went on to discuss the authority that the Director has, but did not use, to take cumulative effects into consideration before making the Approval decision. Credit was given to the Director for recognizing, in hindsight, the potential problems with the air quality in the area resulting in a number of suggested amendments to the Approval, in particular, additional air quality monitoring. The Director has the authority under EPEA to amend an existing approval.

Judicial review

The decision was reviewed by the Court under three standards for judicial review – the standard of correctness, the standard of reasonableness, and the standard of patent unreasonableness.[3] In determining this standard the Court looked at four contextual factors as set out in *Pushpanathan*:[4] the existence of a privative clause or statutory right to appeal, the expertise of the tribunal, the purpose of the legislation, and the nature of the question as law, fact or mixed law and fact. The court gave great deference to the privative clause in EPEA, the expertise of the EAB on the issue of standing, the language in EPEA that provides authority for the EAB to dismiss a notice of appeal, and the issue of standing as a question of mixed fact and law.[5]

The court determined that the issue of standing was intended by the legislators to be left to the jurisdiction of the EAB, but that the decision they made was reviewable under the patent unreasonableness standard. To be patently unreasonable the defect must be apparent on the face of the tribunal's reasons, and must be demonstrated as so by the Applicant (Appellant).[6] The Court found that the personal and expert affidavit evidence presented by the Applicant (Appellant) and the reasonable probability that the Approval Holder's operation could cause a deterioration in air quality at her residence, thus adversely affecting her health, was sufficient to demonstrate a directly affected status.

The Court found the EAB had applied a patently unreasonable test in timing and content, and did not have regard to its own case law on the issue, when it deferred its decision on the Appellant standing until the conclusion of the appeal hearing.[7] It completely disagreed with the EAB that deferring its decision on the Appellant's standing until the hearing was concluded was necessary because of the unusual inextricable link between the issue of standing and the substantive issues of the appeal. The Court found that it would be unusual for an issue of standing not to be inextricably linked to the substantive issues of an appeal.

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Action Update

Creative Sentencing

Part II – Outcome of Workshop

Formal structure & responsibilities

Based on the recommendations of the February 2002 workshop, a five to six person committee will be assembled on a project-by-project basis to assist the Crown Prosecutor assigned to the file with the development, selection and monitoring of creative sentencing projects.

Committee members will vary to some extent with each particular project but the Crown Prosecutor assigned to the file and the investigator in charge of the investigation will form its core. The Crown and the investigator will begin by pinpointing the root cause of the incident. This will be the center-point around which the project is modeled. The Crown Prosecutor will then work with the investigator to determine whether and what kind of scientific or technical expertise might assist in developing and evaluating the merits of any proposed project. In the event of a contested sentencing hearing, such scientific or technical experts might also be called upon to testify in court.

Another key member of the committee will be a specially assigned investigator dedicated to dealing with all creative sentencing projects including investigating such issues as:

1. Does the proposed project result in a secret benefit to the company?
2. Are there conflicts, whether actual or perceived, in directing funds toward a particular group or cause?
3. Are any members of the management or Board of Directors of a proposed project fund-recipient the subject of an ongoing investigation or conviction?
4. Does the proposed project duplicate work that has already been done?

The role of the specially assigned investigator is currently being filled by Faye Hutchings of Alberta Environment. She has also assumed responsibility for securing the services of any experts needed to assist the committee. She is building and will maintain a directory of organizations eligible to participate in creative sentencing, and will act as the historian for all projects, preserving a record and coordinating an after-the-fact survey to determine which projects were truly successful. Ms. Hutchings is also responsible for follow up on all creative sentencing orders and in the case of non-compliance, she will be the lead investigator

From time to time an auditor from Alberta Justice may join the committee. The auditor may be required where there is a question of the financial viability of any proposed recipients of project funds. The auditor will also be used to review the financial reports complied and provided by fund recipients, a standard feature in all creative sentencing orders.

Finally, in some cases the committee would also incorporate an administrator. If the creative sentencing order is very complex or highly technical, or where the project requires ongoing direction to the accused, an administrator may be required to give such direction, choose between options presented by the accused, and assess whether the terms of the order have been met.

The Crown will set the agenda for the committee meeting, bringing forward ideas for potential projects as advanced by the Court, Counsel for the defendants or committee members. The Crown will be responsible to ensure that the project falls within the guidelines, and the orders within the Court's jurisdiction to grant. The February 2002 workshop also recommended that the Crown arrange a workshop for committee members to review on-going projects once every two years.

Amended guidelines based on the work of the Workshop

Perhaps the most important work that was done at the February 2002 workshop was to formalize the guidelines for creative sentencing projects as follows:

Pre-Requisites for Creative Sentencing

- Before a creative sentencing project will be considered as a sentencing option, the accused must demonstrate they are in compliance with existing legislation and that systems are in place to ensure continued compliance.
- As a rule, the cost of the project must be in addition to a substantial monetary penalty; the penalty must remove any economic or competitive advantage that accrued to the accused as a result of the commission of the offence.
- Although the creative sentencing option is available after a finding of guilt, whether or not there has been a guilty plea the offender must accept responsibility for the offence

Limitations on Eligible Projects

- Deterrence should be the primary objective and the yardstick by which the success of such projects is measured.
- The order must be punitive in nature.

(Continued on Page 10)

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(Costs Awarded to Citizens in Inland Cement Appeal . . Continued from Page 6)

The Board will only consider an award of costs for experts where the evidence relates directly to the issues under appeal. Furthermore, the Board will not award costs for witnesses who filed notices of appeal, even if subsequently withdrawn. This suggests that costs might also be refused for witnesses who are active in an organization that is a party in an appeal, since it could be argued they are not "neutral third parties".

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

1 The costs decision is cited as *Muga et al.* (27 June 2003), Appeal Nos. 02-023, 024,026, 029, 037, 047 and 074-CD (A.E.A.B.).
2 R.S.A. 2000, c. E-12.
3 *Environmental Appeal Board Regulation*, AR 114/93 [*Regulation*], s. 18(2) See *supra* note 1 at para. 33.
4 *Regulation, ibid.*, s. 20(2).
5 *Supra* note 1 at para. 30
6 *Supra* note 1 at paras. 106-107.
7 *Supra* note 1 at paras. 115-117, 120
8 *Supra* note 1 at para. 111.
9 *Supra* note 1 at paras. 143-144.
10 The costs decision is cited as *Kievit et al.* (12 November 2002), Appeal Nos. 01-097, 098 and 101-CD (A.E.A.B.). For a discussion of this decision, see K. Barringer, "Costs Awarded to Citizens in Lafarge Appeal" *News Brief* 17:4 (2002) 6.

(Judicial Review Finds EAB Patently Unreasonalbe....Continued from Page 7)

It also said the Appellant was not required to prove she was affected in a unique or different way from other Albertans.

Conclusion

This case is an example of how a judicial review of what appeared to be an unreasonable decision can be successful for an Appellant. At the time of writing the EAB had not yet re-heard this matter. For some, it may be difficult both financially and emotionally to persist with the legal options available. It is a choice that is individual in nature, and will depend on how far an Appellant is willing to take their case. In practice, decisions on directly affected status will continue to be made by the EAB based on their expertise as an administrative body. Decisions such as this one may provide incentive for future challenges on this key threshold matter in the appeal process.

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

1 *Court v. Director, Bow Region, Regional Services, Alberta Environment, re: Lafarge Canada Inc.* (31 August 2002) Appeal No. 01-096-D (Ab.E.A.B.).
2 *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 (Ab.E.A.B.), at paragraph 28.
3 *Court v. Alberta Environmental Appeal Board*, 2003 ABQB 456, Reasons for Judgment.
4 *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.
5 *Supra* note 3 at 19.
6 *Supra* note 3 at 21.
7 *Ibid.*

(Creative Sentencing . . continued from Page 8)

- There must be a nexus or connection between the violation and the project such that the benefits or results of the project truly address the wrong that was done.
- It is essential that the project either improves the environment and/or reduces the level of risk to the public.
- The main beneficiary of the project must be the public. A project that would be undertaken by any company as a "sound business practice" would not be eligible.
- The "public" beneficiaries must be the citizens of Alberta.
- The project must result in a concrete, tangible and measurable result, both in the short term and long term.
- That result must be a "value added" benefit to the environment.
- The benefit must be obvious so that the public understands that the benefit accrued to the public and/or the environment, and not to the accused.
- Projects must clearly exceed current industry standards.

Limitations on Eligible Recipients

- There must be no actual or perceived conflict of interest between the accused and the recipient of project funds.
- All recipients must be not-for-profit organizations.
- All recipients must submit to an investigation as to their viability and accountability.

Administrative Limitations

- There must be no actual or perceived conflict of interest between the recipient of project funds and the Crown or the investigating agency.
- There must be accountability in the sense of control over the funds, either through the mechanism of a trust account as was employed in R. v. Inland Cement Ltd[1], R. v. Cutbank Trucking Ltd.[2], and R. v. Dow Chemical Canada Inc.[3], or alternatively, great specificity in the order and a high degree of control exercised by the sentencing court (R. v. Van Waters & Rogers Ltd.[4], R. v. Cool Spring Dairy Farms Ltd.[5])

Pitfalls in creative sentencing

It is of great concern to the Crown that creative sentencing not be used to divert public funds to benefit the accused. For example, project funds must not be used to pay for what the accused should have already done in terms of clean up, compliance with the law, or compliance with current industry standards. Funds must not be diverted to projects that serve purely commercial interests like supporting asset valuation or preserving the value of land.

Enforceability is also an issue. If a creative sentencing order is breached by failing to pay money into court, a charge of criminal contempt may not be available. In such cases, the creative sentencing order would only be capable of variation, although some assurance is provided by s. 234(1)(e) of the *Environmental Protection & Enhancement Act* which allows the sentencing court to order the offender to post a bond to ensure compliance as part of sentencing.[6]

What does the future hold?

Based on comments from the bench, the interest that many defendants have in participating in creative sentencing and the wealth of opportunities for serving the public interest through the creative sentencing process, it is anticipated that creative sentencing will continue to be a major , and perhaps, a proportionately larger part of sentencing in environmental matters. However, at the same time, it is also anticipated that the Crown will be asking for more, rather than fewer, limitations on such projects based on past successes and failures. In any case, it is certain that all creative sentencing projects will be investigated with the same care as the original investigation.

■ **Susan McRory**
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■ **Lynda Jenkins**
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1 (December 6, 1996) Edmonton (Alta. Prov. Ct.).
2 (August 29, 1997) Grande Prairie, No. 7027 0103P10101 (Alta. Prov. Ct.).
3 (1996) 23 C.E.L.R. (N.S.) 108 (Alta. Prov. Ct.)
4 (1998) 220 A.R. 315 (Alta. Prov. Ct.).
5 (1999) 29 C.E.L.R. (N.S.) 75 (Alta. Q.B.).
6 R.S.A. 2000, c. E-12

Note: Part 1 of this article was printed in the previous issue of News Brief.

By Corbin D. Devlin, *McLennan Ross LLP*

Seeking Answers About Regulatory Requirements for Projects Impacting Water Bodies

There are many regulatory requirements for projects of every size and description that may impact water bodies in the province. The web of requirements is sufficiently complex that simple, practical answers are required. What legislation is relevant? When are regulatory requirements triggered? When is an approval or a license required? Fortunately, there are several sources of such practical information. In particular, policies, guidelines and fact sheets published by the relevant authorities are invaluable.

One reason for the complexity is that there are separate federal and provincial requirements. The federal and provincial governments share jurisdiction over the environment, and the federal government has exclusive jurisdiction over fisheries. Although the relevant federal and provincial authorities work continuously to coordinate their activities, and will normally provide cross-referrals if a project appears to invoke the jurisdiction of the other authority, the person responsible for any particular project has the obligation to ensure that separate federal and provincial requirements are met. Failure may result in enforcement action by the relevant authority.

Seeking answers about federal requirements

In the federal arena, the *Fisheries Act* sets out the most important requirements relating to work in or around water bodies. Among other things, the *Fisheries Act* prohibits work that results in the harmful alteration, disruption, or destruction (HADD) of fish habitat, but allows the Minister to authorize HADD on conditions that will mitigate any harm to the environment. Determining whether certain work results in HADD, or even whether the area in question is considered fish habitat, may involve some interpretation.

A person undertaking work in or around water should also be aware of other relevant federal legislation, such as the *Migratory Birds Convention Act* and *Navigable Waters Protection Act*.

A recommended starting point is the publications by Fisheries and Oceans Canada that provide guidance on practical questions. Fact Sheets, Guidelines and similar documents are available at <httpa;//www.dfo-mpo.gc.ca/canwaters-eauxcan/water-eau/index_e.asp>. Some of the Fact Sheets are specifically tailored to other provinces, but they are applicable to Alberta with some minor differences. More detailed policies and guidelines are available, such as the "Decision Framework for the Determination and Authorization of Harmful Alteration, Disruption or Destruction of Fish Habitat", which outlines the criteria and decision making process used to determine HADD in the eyes of Fisheries and Oceans Canada.

Federal Government personnel are also available to answer practical questions about the requirements of the *Fisheries Act* and the federal approval process. Fisheries and Oceans Canada has four offices in Alberta: Calgary ((403) 292-5160), Edmonton ((780) 495-4220), Lethbridge ((403) 394-2920), and Peace River ((780) 618-3220).

Seeking answers about provincial requirements

In the provincial arena, the *Water Act* sets out most of the requirements relating to work in or around water bodies. Construction activities or other disturbances to a water body are subject to review and may require approval under the *Water Act*.

Regulated activities include projects resulting in diversion of water from a water body, or resulting in filling, drainage or shoreline alteration of a water body. Determining when the legislation is triggered may involve some interpretation, and understanding the approval process may require some assistance. It is also important to be aware of other relevant provincial legislation, such as the *Environmental Protection and Enhancement Act*.

Many useful publications are available from Alberta Environment, such as the *Administrative Guide for Approvals to Protect Surface Water Bodies Under the Water Act*, which sets out information on critical considerations such as the criteria for determining a water body under the *Water Act*, activities requiring an approval or warranting an exemption, and mitigation measures that may be required. This administrative guide and other practical documents are either available on the Internet at <http://www.gov.ab.ca/env/water.html> or from the Alberta Environment Information Centre at (780) 944-0313.

Alberta Environment personnel can also provide practical advice regarding provincial regulatory requirements and the approval process. They can be contacted through any Alberta Environment Regional Approvals Office ((403) 297-7602 in Calgary; (403) 382-4254 in Lethbridge; (780) 963-6131 in Stony Plain; (403) 340-7654 in Red Deer; (780) 427-5296 in Edmonton and (780) 624-6167 in Peace River). For more complex questions, the Environmental Law Centre staff may be able to offer additional insight or provide a referral to a lawyer familiar with the relevant federal and provincial requirements.

Ask Staff Counsel

Greater Onus on Landowners under New Reclamation System

Dear Staff Counsel:
I own land on which there is an oil well. I've heard that the government is changing the reclamation certificate process for oil and gas wellsites. How will these changes affect me when the oil company decides to shut down its well?

Sincerely,
Wattle L Dew

Dear Wattle L Dew:
Alberta Environment has developed a new program for granting reclamation certificates for all upstream oil and gas facilities. This includes wellsites, batteries and pipelines on both private and public land. This program will take effect October 1, 2003.

The changes

The most significant change for landowners is the elimination of the current requirement for a reclamation inquiry, which is a field inspection by a government inspector, before a reclamation certificate can be issued. Under the new program, an application for a reclamation certificate will undergo an office review for administrative and technical criteria, following which a certificate may be issued.

Oil and gas operations will be required to provide more information to landowners at the time of application, including copies of the application and any reports on reclamation assessment and contamination status. While reclamation certificates have traditionally focused only on restoration of the land surface, over the past few years Alberta Environment has included resolution of contamination matters as part of the reclamation certification requirements for oil and gas sites.

Alberta Environment anticipates carrying out field audits on approximately 15 percent of sites certified under the new program. Some sites will be audited on a random basis, and some field audits will occur in response to complaints. Reclamation certificates will be cancelled for sites that do not pass a field audit. The rights of both landowners and operators to appeal reclamation certificate matters to the Environmental Appeal Board will remain intact under the new program.

What it means for landowners

Under the new program, it will be important for landowners to be more vigilant about the condition of their land and more vocal about concerns they may have related to issuance of a reclamation certificate. There is no guarantee that a property will be inspected through a field audit, even if a complaint is made. Given the fact that most properties in Alberta will not be inspected, landowners will need to ensure that they receive all required information (application form, reclamation assessments, environmental site assessments) from operators at the time of the application, and that they raise any concerns or complaints they have as early as possible. While providing additional information to landowners is generally a positive step, it also increases the burden on those landowners to deal with and attempt to understand much more technical information, without assistance that might previously have been provided by the reclamation inspector at the field inquiry.

Landowners should also be aware that cancellation of a reclamation certificate following a field audit will require the operator to re-enter the land to correct the deficiencies. As part of this re-entry, the operator will need to reach a new access agreement with the landowner, as the original surface lease will have been terminated upon the issuance of the reclamation certificate. The mechanism for putting new access agreements in place is unclear; it is possible that revisions may be made to the surface rights regulatory system, or the matter may be left to direct negotiation between landowners and operators.

Ultimately it appears that the new reclamation certificate program will place a greater onus, and potentially greater expense, on landowners to protect their interests in relation to proper reclamation of their property. While many agricultural landowners in particular have a good grasp of the basic elements of surface reclamation, contamination issues are often much more technically complicated. It is likely that many landowners may need to obtain outside assistance to interpret and understand environmental site assessments provided to them as part of the application package, before determining whether they are in agreement with the application for a reclamation certificate.

For further information about the new reclamation certificate program, contact Alberta Environment at (780) 944-0313 (toll-free in Alberta by first calling 310-0000), visit the Alberta Environment website at <http://www3.gov.ab.ca/env/protenf/landrec/upstream/index.html> or call the Environmental Law Centre at 1-800-661-4238.

Prepared by:
Cindy Chiasson
Executive Director

Ask Staff Counsel is based on actual inquiries made to Centre staff. 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 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.

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