News Brief

ENVIRONMENTAL LAW CENTRE

Vol. 19 No. 3 2004
ISSN 1188-2565

204, 10709 Jasper Avenue
Edmonton, Alberta T5J 3N3

In This Issue

Court Affirms Purpose of Alberta's EIA Process 1

Animal Welfare Law Reform Stalled in Parliament 3

In Progress 4

Case Comments
Supreme Court Rules in Favour of Genetically Modified Canola 5
Water, Water Everywhere But Will We Get a Drink? 6

Report on Oilfield Injection of Water Finalized 7

Action Update
E-Recycling Details Hidden Behind Closed Doors 8

Practical Stuff
Launching a Private Prosecution 11

Ask Staff Counsel
Conservation Easements – Benefits and Barriers 12

Environmental Law Centre

Celebrating
22 years of excellence in
environmental law

1982 – 2004

Court Affirms Purpose of Alberta's EIA Process

Castle-Crown Wilderness Coalition v. Flett, 2004 ABQB 515 (2 July 2004)

The Alberta Court of Queen's Bench recently addressed the purpose and function of the provincial environmental impact assessment (EIA) process. The decision is of interest for its thoughtful examination and review of the various regulatory processes at play in relation to a proposed expansion of the Westcastle ski area in southwestern Alberta, with particular focus on the ability of those processes to address and assess likely environmental impacts of the proposal.

Background

Ski lifts have been operating in the West Castle Valley since the mid-1960s.[1] In 1993, a proposal to develop a four-season resort at the ski hill site was subject to an EIA and a public hearing before the Natural Resources Conservation Board (NRCB). The proposal was conditionally approved by the NRCB and development proceeded at the site during the mid-1990s.

The current decision relates to a new proposal by the resort operator to significantly expand the resort by adding ski runs, snow making equipment, housing and other infrastructure. The operator consulted Alberta Environment about the need to submit an EIA for the proposed expansion. The Director, an official within Alberta Environment charged with responsibility for the EIA process under the *Environmental Protection and Enhancement Act*[2] (EPEA), reviewed the proposal and ultimately decided that an EIA was not required. Castle-Crown Wilderness Coalition ("the Coalition") requested that the Minister of Environment exercise his powers under EPEA to require an EIA, but the Minister declined to do so.

The Coalition then applied to the Court for judicial review of both the Director's and Minister's decisions.

The decision

The main issues addressed by the Court were the Director's determination that the proposed expansion was not subject to the EIA process and the decisions by the Director and the Minister that an EIA was not required. The issue of applicability of the EIA process revolved primarily around whether the proposed expansion was a "proposed activity" in accordance with EPEA.[3] The Director had held that the activity, namely the ski resort, had already commenced and thus was not a proposed activity subject to the EIA process. However, the Court found that the Director had interpreted the legislation too narrowly in light of EPEA's broad purposes. Justice Kenny commented:

> ...I assume that it was her view that because there were some buildings on the land, along with a ski hill that was in operation, that the activity had already commenced. Taking that argument to its logical conclusion, any existing recreational or tourism facilities could enlarge its facilities and thereby their use in any astronomical number and, because there was already an existing facility in operation, their enlargement would never be subject to the environmental assessment process. This cannot possibly be the correct interpretation of the legislation,

(Continued on Page 2)

Environmental Law Centre
News Brief
Volume 19 Number 3 2004

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

EDITOR
Cindy Chiasson

ASSISTANT EDITORS
Keri Barringer
James Mallet

PRODUCTION EDITOR
Debbie Lindskoog

ADVISORY COMMITTEE
Ron Kruhlak,
McLennan Ross
Marta Sherk,
City of Edmonton
Law Department

One Year Subscription: $140+GST
Non-profit Environmental
Organizations: $40+GST

G.S.T. Registration: 11890 0679 RT0001

Phone: (780) 424-5099
Fax: (780) 424-5133
E-mail: elc@elc.ab.ca
http://www.elc.ab.ca

(Court Affirms Purpose of Alberta's EIA Process. . .Continued from Page 1)

> particularly when one looks at the purpose of the EPEA which is the protection of the environment, the need to balance environmental protection with economic factors and to prevent and mitigate the environmental impact of development.[4]

This approach is consistent with other court decisions providing for a liberal interpretation of EPEA[5] and also with ensuring consideration of environmental concerns related to growth in activities created prior to EPEA's inception.

Having found that the proposed expansion was subject to the EIA process, the Court then addressed the Director's and Minister's decisions that an EIA was not required. Significant attention was given to material in the record, including various memos that indicated that the Director felt that an EIA report was required to address all aspects of the project, prior to making her ultimate decision not to require an EIA.

In determining whether the Director's and Minister's decisions were patently unreasonable, the Court reviewed the different forms of regulatory authorizations that the proposed expansion would require. This review focused on whether these authorizations would effectively address cumulative effects which had been identified as a main concern by Alberta Environment in its screening of the project. Both the Director and the Minister had indicated, in not requiring an EIA, that existing regulatory authorization processes would suffice to deal with the potential environmental impacts of the proposed expansion.

The Court's review examined processes and authorizations related to both public and private land and considered whether any could provide the information and analysis that could be achieved through the EIA process. Ultimately, the Court found that the only process that would address the overall environmental impacts of the proposed expansion in an integrated fashion is the EIA process.[6] As the EIA process was the only way to obtain the information that could answer the Director's concerns as expressed in the record, the Court found that both the Director and the Minister were patently unreasonable in not requiring an EIA.[7]

Commentary

One of the most important effects of this case is its affirmation of the role and purpose of the EIA process, especially in relation to other forms of statutory authorization and review that may apply to projects in Alberta. As Justice Kenny stated:

> The purpose of the environmental assessment process set out in s. 40 of the EPEA is global in the sense of looking at environmental protection and sustainable development, the integration of environmental protection and economic decisions at the earliest stages and dealing with environmental, social, economic and cultural consequences of an activity which all the while provides for input at all levels. None of the other regulatory processes referred to by the Director and the Minister can address cumulative effects and broader environmental impacts.[8]

(Continued on Page 9)

Animal Welfare Law Reform Stalled in Parliament

For those who care about our environment, respect for the natural world generally extends to the species and individual animals that make up its living components. Thus, there is in many cases an intersection between environmental values and animal welfare concerns. In the latter area, human interactions with non-human animals are not limited to wildlife concerns, but extend to domestic animals as well. In recent years, Canadian animal welfare laws have been the subject of reform efforts in several jurisdictions.

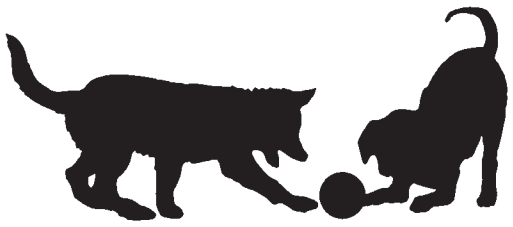
One of the central law reform projects is the federal government's effort to modernize sections 444 through 447 of the *Criminal Code*, which penalize deliberate animal cruelty and neglect.[1] These provisions, which date to 1896 (with a few minor adjustments in the mid-1950s and 1970s), are a patchwork of antiquated and inadequate sections that are sadly in need of modernization. Victorian notions, such as the idea that cruelty to cattle is more serious than cruelty to other animals, are obvious problems. Mistreatment of wild, stray and owned animals is not treated consistently. Fewer than one quarter of 1 percent of investigations result in successful prosecutions, and conviction rates are in the neighbourhood of 30 percent (1996-97).[2] Penalties are low and sentencing options few. Yet, due to gaps in provincial legislation, several jurisdictions use the federal Code as their sole prosecution option. Given modern data showing startling links between animal abuse and other antisocial behaviour (including spousal abuse, child abuse and murder), there are broader social interests at stake here too.[3]

The federal reform proposals are modest. In brief, the core proposals are: (1) a unified definition of "animal" (non-human vertebrate) so that cattle are not treated preferentially; (2) movement of the provisions out of the property crime section of the Code and into a new section, to reflect the fact that unowned (wild and stray) animals are protected too; (3) two new crimes of killing law enforcement animals and prohibiting the vicious or brutal killing of animals; (4) sentencing improvements; and (5) making the current restrictions on baiting, captive shooting and fighting extend equally to animals other than birds.

Despite the modest nature of these proposals, the fourth Bill (C-22) attempting to pass these amendments died on May 28, 2004 when the federal election was called. Hopefully, a fifth incarnation of the Bill will be reintroduced when the 38th Parliament opens October 4, 2004. The amendments, despite considerable public support, are being held up by the Senate as a result of the extreme politicization of the proposal, which has resulted in varying degrees of opposition to the Bill by groups as disparate as medical researchers, the gun lobby, anti-abortionists and farmers. Exaggerated claims about the legal implications of the proposals have clearly served a political agenda. As just one example, there has been a huge controversy over removing the cruelty sections from that part of the Code which protects property, amid allegations that this will create "animal rights" or undermine human "property rights."

In fact, society recognizes that both owned and unowned animals are not just like tables or cars; they can suffer and, for example, when we wish to get rid of them, there are widely-shared, legitimate concerns about the method chosen for their disposal or death. Thus, we set standards for accepted activities such as hunting, slaughter or euthanasia. Persons who act far outside these agreed standards, for example by torturing an animal to death, should be subject to criminal sanction regardless of whether the animal was wild, stray, or domesticated. The proposed reforms, which would provide protection for all animals, do not derogate from the rights of property owners in any way. No existing protections of human property rights in owned animals (e.g., prohibitions against theft) are being removed,[4] and aboriginal rights continue to be protected by the Constitution.

In fact, the core legal standard for what constitutes illegal abuse of animals remains unchanged under the new Code proposals; what is prohibited is "unnecessary suffering" of animals caused by wilful, reckless or criminally negligent behaviour. *R. v Menard* established that this standard requires proportionality between (1) a legitimate purpose for the activity and (2) choosing means of accomplishing that purpose which do not cause more suffering than is reasonably required.[5] "Lawful excuses" remain available as defences; as mentioned before most accepted animal uses, such as slaughter, are regulated already. Inadequately regulated aspects of these activities arguably require more comprehensive standards, not exemptions from abuse laws. Indeed, persons who deliberately abuse animals while purporting to engage in legitimate activities must remain within reach of the law.



In the final analysis, most of the significant proposed changes to the Code are in the penalty provisions. Maximum fines are made more significant, more severe imprisonment options are available (up to 5 years), and various prohibition and restitution orders can be made. For example, a convicted offender can now be prohibited from ever owning animals again, and humane societies can be reimbursed for the cost of rehabilitating seized animals. Even with these overdue changes, better deterrence will remain difficult to achieve, given ongoing chronic under-funding and under-staffing of humane societies and their inspectors, who need the direct support of their communities as well as political support for an updated legal regime.

(Continued on Page 9)

In Progress

In the Legislature...

Alberta Legislation

The *Occupiers' Liability (Recreational Users) Amendment Act, 2003*, S.A. 2003, c. 45, is in force as of May 1, 2004. The Act reduces the liability of landowners and occupiers with respect to recreational users. Related to this, sections 2 and 3 of the *Justice Statutes Amendment Act, 2003*, S.A. 2003, c. 41, are also in force.

The *Agricultural Operation Practices Amendment Act, 2004*, S.A. 2004, c. 14, is in force as of June 1, 2004. Regulations pursuant to the *Agricultural Operation Practices Act* have been amended as well. These are Alta. Reg. 88/2004, the *Board Administrative Procedures Regulation*; Alta. Reg. 90/2004, the *Agricultural Operations, Part 2 Matters Regulation*; and Alta. Reg. 85/2004, the *Standards and Administration Regulation.*

British Columbia Legislation

The *Environmental Management Act*, S.B.C. 2003, c. 53, is in force as of July 8, 2004. It replaces the *Waste Management Act* and the *Environment Management Act*. The *Waste Discharge Regulation*, B.C. Reg. 320/2004, is also in force as of July 8, 2004. As well, there are amendments to the *Special Waste Regulation*, the *Contaminated Sites Regulation*, the *Conservation Officer Service Authority Regulation*, and the *Environmental Data Quality Assurance Regulation.*

Bill 28, the *Coal Act*, S.B.C. 2004, c.15, passed third reading on April 27, 2004 and received Royal Assent on April 29. The Act is a re-write of the *Coal Act* and comes into force on various dates. The *Coal Act Regulation*, B.C. Reg. 19/93, is repealed and replaced by a new *Coal Act Regulation.*

Bill 33, the *Forest Statutes Amendment Act, 2004*, S.B.C. 2004, c. 36, was introduced on April 26, 2004, passed third reading on May 4, 2004 and received Royal Assent on May 13, 2004. The Act repeals the *Forest Practices Code of British Columbia Act* and comes into force in part with Royal Assent and in part through regulation.

Bill 51, the *Wildlife Amendment Act, 2004*, S.B.C. 2004, c. 56, was introduced on May 12, 2004, passed third reading on May 17, 2004 and received Royal Assent on May 20. The amendments address species at risk. The Act will come into force by regulation.

Cases and Enforcement Action...

News from the Alberta Provincial Court includes:

- Sentencing of Buffalo Airways Ltd. of Red Deer to a penalty of $50,000 after the Company pled guilty to one count of improper disposal of hazardous waste. The charge follows spraying paint stripper onto an aircraft and allowing the paint stripping wastes to drain to the storm sewer system. The penalty consists of a $10,000 fine and a Creative Sentencing Order of $40,000 to develop a training program for individuals to learn the proper process of aircraft paint stripping.
- Sentencing of 964405 Alberta Ltd., operating as Alberta Airborne Solutions, of Vegreville to a $1,000 fine and a prohibition from using pesticides for three years after finding the company guilty of improper application of a pesticide in violation of the *Environmental Protection and Enhancement Act*. The charges resulted from damage to neighboring property during an aerial application.
- A Judge in Cochrane sentencing Said Khorfan of Calgary to a $1,150 fine after receiving a guilty plea to improper disposal of waste in violation of the *Environmental Protection and Enhancement Act.* In addition to the penalty, Mr. Khorfan was ordered to pay $2,423 to Alberta Environment for the clean-up and disposal costs of the dumped wastes which he had been hired to haul to an area landfill.

The Alberta Court of Queen's Bench released a decision in *Castle-Crown Wilderness Coalition v. Flett*. This was an application for judicial review of the decisions related to expansion of the Castle Mountain Resort, specifically addressing whether an environmental impact assessment was required for the new developments. The Justice ruled that both the Director's and the Minister's decisions were "patently unreasonable" and referred the matter back to the Director (see page 1).

Alberta Environment issued an administrative penalty under the *Environmental Protection and Enhancement Act* in the amount of $11,500. The penalty was issued to Telus Communications Inc. of Edmonton for installing fire suppression equipment containing Halon-1301, also known as bromotrifluromethane, for release of an ozone-depleting substance or halocarbon without an approval, and for failing to report the release. The penalty was assessed further to the *Ozone-Depleting Substances and Halocarbons Regulation*, s. 6(2) and 2(1), and s. 110 of the *Environmental Protection and Enhancement Act.* The penalty was paid on June 23, 2004.

■ **Dolores Noga**
Information Services Coordinator
Environmental Law Centre

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>.

Case Notes

Supreme Court Rules in Favour of Genetically Modified Canola

Monsanto Canada Inc. v. Schmeiser, 2004 SCC 34

On May 21, 2004, the Supreme Court of Canada upheld the decision of the Federal Court of Appeal in the *Schmeiser* case, significantly expanding the scope of patent protection over agricultural biotechnology products. The decision is a blow for Percy Schmeiser and many environmental and public interest groups who oppose extending patent control over higher life forms.

Background

Monsanto is a US-based agrochemical multinational corporation. The company is best known for its herbicide Roundup, a glyphosate-based herbicide that is widely used on the Canadian prairies to control unwanted weeds in food crops. In 1993, Monsanto obtained a Canadian patent for a genetically engineered gene and cell which, when inserted into plants, dramatically increase tolerance to Roundup. The insertion process was also patented. Canola seed containing the gene and cell, called Roundup Ready Canola, has been sold by Monsanto in Canada, and widely used, since 1996. Farmers wishing to plant the Monsanto seed must enter into a user agreement with the Company providing that the farmer will sell the crop only to authorized purchasers. In addition, the farmer must agree not to sell or give the seed to another party, or save seed for replanting or inventory.

Percy Schmeiser, a Saskatchewan farmer, was sued by Monsanto in 1998 after the company discovered canola containing their patented gene growing on Schmeiser's property. Schmeiser had not purchased the seed, nor had he signed a user agreement or obtained Monsanto's permission to plant, harvest, or otherwise use the seed or plants.

Infringement and the scope of Monsanto's patent

In finding that Schmeiser had infringed Monsanto's patent, the majority of the Supreme Court (five of nine justices) emphasized the importance of giving effect to the Company's monopoly granted under the *Patent Act*. The majority reasoned that limiting patent protection to the gene and cell as created in the lab would defeat the purpose of the patent, which was to allow Monsanto to the full commercial benefit of its invention. As a result, Monsanto was held to have the exclusive right to make or use seeds and plants containing the gene and cell.

The court relied on case law stating that where a patented invention is a significant or important part of something that is not patented, a case of infringement can be established.

Addressing Schmeiser's argument that plant reproduction was a natural process and not patentable, the majority emphasized the human role in agricultural propagation. On this basis, and in order to give effect to patent's purpose, the patent was given a broad scope, allowing the court to find that Schmeiser's efforts in collecting, saving, planting and harvesting the seed and plant constituted an infringement.

The court held that Schmeiser's intent and the fact that he did not use Roundup on the Roundup Ready Canola were both irrelevant to the infringement.

The dissent

The dissent, arguing from a similar perspective, came to a totally different result. Like the majority, the dissent stressed that the court's role was limited to determining the lawful scope of the patent under the provisions of the *Patent Act*, and whether Schmeiser had infringed Monsanto's patent rights. The minority relied on the *Harvard College* case, in which higher life forms, including plant matter, were held to be unpatentable.[1] While the majority found that use of the seed and plants was protected even though the patent itself was limited to the gene, cell, and insertion process, the dissent asserted that Monsanto should not be entitled to any monopoly rights over unpatentable subject matter. The fact that such an extended monopoly was necessary to allow Monsanto to reap the full commercial benefit of the invention was not determinative.

The dissent also stressed the need for fairness and predictability in construing the scope of patent protection. The patent itself did not include claims to seeds or plants, and farmers and plant breeders could not reasonably have expected that the seed and plants would be protected under Monsanto's patent.

Comment

In the *Schmeiser* case, the court confirmed that higher life forms are not patentable under Canadian law. However, by extending protection to any use of seed and plants derived from the patented material, the majority has granted what is, practically speaking, a monopoly on any use of the seed and plants. This is the optimum result for Monsanto, as they have won the protection they sought on the basis of a patent that cannot be challenged for including claims to higher life forms.

(Continued on Page 10)

Case Notes

Water, Water Everywhere But Will We Get a Drink?

Mountain View Regional Water Services Commission et al. v. *Director, Central Region, Regional Services, Alberta Environment* re: *Capstone Energy* (26 April 2004), Appeal Nos. 03-116 and 03-118-121-R (A.E.A.B.)

A recent decision of the Environmental Appeals Board (EAB) has brought into question Alberta Environment's approach to regulating groundwater diversions for oilfield injection purposes. Several points make this decision a significant one for the oil industry and persons concerned with the use of freshwater for oilfield injection. The Board confirmed the relevance of intended use in the decision to issue a licence, and ruled that guidelines for surface water diversions should apply to groundwater as well. The Board also commented on the need for much greater scrutiny of oilfield injection uses, and for a comprehensive provincial policy on this issue.

Background

In July, 2003, Alberta Environment issued a Preliminary Certificate under the *Water Act*[1] to Capstone Energy Ltd. ("Capstone") for the diversion of water from the Red Deer River for oilfield injection purposes. The effect of a Preliminary Certificate is to assure the applicant that once it has met all regulatory requirements, a license to divert water under specified conditions will be issued. The decision to issue the Preliminary Certificate was appealed to the EAB by the City of Red Deer, the Mountain View Regional Water Services Commission, and three landowners: Gerald Oxtoby, Terry Little and Kelly Smith.

Intended use of the water

Alberta Environment argued that the intended use of diverted water plays a very limited role in the decision to grant a licence under the *Water Act*. Rejecting this argument, the Board found that, in order to fully consider and implement the relevant provisions of the Act, the Director was required to consider the purposes of the proposed allocation.[2] The Board focused on the fact that oilfield injection does not return water to the hydrological cycle, and indicated that the intended use was of critical importance in determining the long-term effects on the aquatic ecosystem.[3]

The Board also pointed out that the use of water for oilfield injection purposes was specifically allowable under *Water Act* regulations.[4] However, the EAB found that it was implicit in the *Water Act* that any use of water which effectively removes water from the hydrological cycle, as oilfield injection does, should undergo "*much* greater scrutiny",[5] and that proponents of such projects should conduct a comprehensive alternatives analysis before being granted a licence.

Analyzing alternatives

The Board found Capstone's investigation of alternatives to surface water injection insufficient, especially in regards to non-potable water options. In stressing the need to consider available alternatives, the Board set out a two-step approach that would provide a more complete analysis.

The first step is to fully consider the technical, economic and regulatory feasibility of alternatives to fresh water.[6] Only after it is concluded that no other feasible option exists would fresh water be considered. Secondly, the Board's approach requires the proponent to show that any proposed fresh water allocation would be used efficiently.[7]

The Board recommended that a condition be added to the Certificate requiring Capstone to provide the Director with a more detailed and complete analysis of alternatives before a licence would issue.

Surface vs. ground water

The Board found that the *Groundwater Evaluation Guideline,*[8] which addresses oilfield injection uses, also applied to allocations of surface water due to the expansive definition given to the term groundwater in the *Water Act.*[9] This finding results in the striking out of parts of the Guideline that are inconsistent with the *Water Act* definition.[10] Furthermore, in the Board's view there was no reasonable basis to distinguish between surface water and groundwater, given that the overall environmental effects are the same and in light of the growing demand on all of Alberta's water resources.[11]

Policy vacuum

The Board expressed concern throughout its decision with the lack of a comprehensive policy to guide decisions regarding the use of fresh water for oilfield injection. On this basis, the Board recommended that the proposed licence be issued for a one-year term and be revised to comply with the terms of any relevant future policy. The Board went on to recommend that, if a policy is not available to the Director at the time of renewal, the proposed licence should only be renewed for a second one-year term.[12] Finally, the Board recommended that, if an applicable guideline is still not in place after this second one-year term, any further renewal should not exceed three years until a policy framework is "better established."[13]

(Continued on Page10)

Report on Oilfield Injection of Water Finalized

In response to concerns voiced during Alberta's *Water For Life* consultation process, the Minister of Environment established a multi-stakeholder committee in the fall of 2003 to examine oilfield injection and other water uses that remove water from the hydrological cycle. The breakdown of the appointed committee members is as follows:

Provincial government:	5
Industry (oil and gas, chemical):	4
Agriculture:	2
Public-at-large:	2
Environmental non-profit:	1
Municipal association:	1
Environmental services:	1

The mandate of the committee is to identify issues, examine alternatives, and prepare recommendations for the Minister on oilfield injection and similar uses of water. Among other matters, the committee has examined:

- policy changes to reduce freshwater injection;
- recommending changes to industrial practices to reduce freshwater use;
- improving communication with companies, stakeholders and the public; and
- improving research, data collection and access.

As recently emphasized by the Environmental Appeals Board in the *Capstone* decision (see page 6), there is no effective policy in place for surface water diversions for oilfield injection purposes. Licensing the removal of water from the hydrological cycle for resource development involves a difficult balancing of environmental, social and economic factors. Industry, municipalities, individual water users, and environmental groups all require greater certainty in how the Department of Environment will handle applications for such diversions. The general public also requires reassurance that our water resources are not being squandered.

In its preliminary report, submitted to the Minister of Environment in March, 2004, the committee recommended against an immediate, province-wide elimination of underground freshwater injection. Some members supported elimination as a long-term goal. Other recommendations for reducing injected volumes of freshwater included :

- a cooperative approach in which government and industry work together to achieve significant reductions;
- a requirement that applicants for licenses identify and evaluate alternatives to freshwater injection;
- comprehensive and consistent policy guidelines for regulatory decisions involving underground injection;
- the establishment of water conservation plans and targets for all sectors, including oilfield injection;
- voluntary reviews of conservation opportunities by permanent license holders;
- improved messaging from government agencies regarding the need for conservation;
- the establishment of a publicly accessible database of allocation and water use information;
- the development of an inventory of the province's groundwater supplies; and
- increased government and industry investment in emerging technologies and their applications.

Input from the public on the report and recommendations was requested by May 31, 2004. The committee has since finalized the report, and submitted it to the Minister in early August. It is unclear when the Minister will make the report public.

The *Capstone* decision highlights the importance of the work of this committee. Underground injection is an issue of vital social and environmental importance that must be addressed through a comprehensive policy. Given growing pressures on Alberta's freshwater resources, gradual elimination of uses that remove water from the hydrological cycle is in the public interest. Industry will require certainty in any government plan to achieve this goal. The Minister should act quickly on the committee's recommendations, and proceed immediately with the development and implementation of the policy.

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

Action Update

E-Recycling Details Hidden Behind Closed Doors

A new program requiring recycling of electronic equipment will come into effect in Alberta in October 2004. This program provides for the collection of environmental fees in the range of $5 – $45 per item, initially in relation to televisions and computer equipment, and the administration of those fees and the related recycling program by the Alberta Recycling Management Authority (ARMA).[1] While the program appears to offer future environmental benefits by removing substances of concern, such as lead and mercury, from Alberta's waste stream, its structure does raise concerns, primarily in relation to public accessibility and accountability.

Structure of Alberta's recycling programs

In Alberta, government-created recycling programs are established under the authority of the *Environmental Protection and Enhancement Act* (EPEA).[2] Part 9 of EPEA provides for the creation of industry-operated recycling funds in relation to "designated materials", which are materials designated by regulation as being subject to recycling programs and fees.

Since the mid-1990s, these recycling programs have been run by bodies known as delegated administrative organizations (DAOs), rather than the Alberta government. DAOs can be created by the province under EPEA to perform duties delegated to them by government officials or the Minister of Environment. It appears that the only limitation on such delegation is that the Minister may not delegate to DAOs the powers to make regulations and to further delegate.[3] Recycling DAOs established under EPEA include the Beverage Container Management Board, Alberta Used Oil Management Association, and Tire Recycling Management Association.[4]

While these DAOs are given their authority to administer the recycling programs by regulation, they are all incorporated as societies under the *Societies Act*[5] and function as bodies apart from the provincial government. In establishing the framework for the electronics recycling program, the province has continued the Tire Recycling Management Association, but provided that recycling programs for other designated materials may be brought under the wing of that same body.[6] It appears that the Tire Recycling Management Association has been renamed and restructured (although not by regulation) into ARMA, with separate "divisions" dealing with tire recycling and electronics recycling.[7]

Concerns

The major concerns regarding the electronics recycling program (and which also apply to other Alberta recycling programs) are the lack of public accessibility and accountability on the part of the administering DAO. Many of the details and requirements of the recycling program, including registration requirements for those dealing with designated materials, processes for submission of recycling fees to ARMA, and requirements for those dealing with designated materials to report to ARMA, are to be dealt with in ARMA's bylaws.[8] However, neither EPEA nor the relevant regulations require ARMA to publish its bylaws or otherwise make them publicly accessible. This not only greatly impairs the ability of those dealing with designated materials to determine their responsibilities under the recycling scheme, but also limits ARMA's accountability to the general public regarding its operations and role as administrator of the electronics recycling program. In contrast, the bylaws of the Alberta Used Oil Management Association are published and readily accessible as separate Alberta regulations, in accordance with requirements of the regulation dealing with used oil recycling.[9]

Of equal significance is the lack of any obligation on the part of ARMA to publicly report on its activities, including the status and use of the recycling funds accepted by it. Although government press material states "ARMA will be required to report annually to Albertans how the fund is being used",[10] the DAO is only required to provide an annual report and audited financial statements to the Minister, without any statutory obligation on either ARMA or the Minister to make those documents accessible to the general public.[11] ARMA is subject to the requirements of the *Freedom of Information and Protection of Privacy Act*; however, it can be cumbersome and costly to access information under those provisions.

Opening the doors

Given the potentially significant amounts of money that could be handled by ARMA under the electronics recycling program, there should be greater accessibility and accountability imposed on it. The Alberta government should amend the *Designated Material Recycling and Management Regulation* to make the DAO's bylaws publicly accessible, as is the case with the Alberta Used Oil Management Association. Amendments should also be made to require public release of ARMA's annual report and audited financial statements, either by amending the regulation or by requiring those documents and others related to the electronics recycling program to be made accessible under section 35 of EPEA. The public, who will bear many of the costs and obligations of this new recycling program, deserve the opportunity to scrutinize the operation of the program and ARMA's activities.

■ **Cindy Chiasson**
Executive Director
Environmental Law Centre

1 Government of Alberta, News Release, "Alberta launches Canada's first provincial program for e-recycling" (6 May 2004), online: Government of Alberta <http://www.gov.ab.ca/can/200405/16394.html>.
2 R.S.A. 2000, c. E-12.
3 *Ibid.*, s. 37. Section 37(e) establishes the scope of delegation to DAOs.
4 The Beverage Container Management Board derives its authority from the *Beverage Container Recycling Regulation*, Alta. Reg. 101/97. The Alberta Used Oil Management Association's authority is granted under the *Lubricating Oil Material Recycling and Management Regulation*, Alta. Reg. 82/97, while the Tire Recycling Management Association was initially empowered under the *Tire Recycling and Management Regulation*, Alta. Reg. 206/96.
5 R.S.A. 2000, c. S-14.
6 *Designated Material Recycling and Management Regulation*, Alta. Reg. 93/2004.
7 *Supra* note 1.
8 *Ibid.*
9 The bylaws of the Alberta Used Oil Management Association are set out in the *Lubricating Oil Material Recycling and Management By-Law*, Alta. Reg. 141/97, and the *Lubricating Oil Material Environmental Handling Charge By-Law*, Alta. Reg. 160/97. Section 8(2) of the *Lubricating Oil Material Recycling and Management Regulation*, *supra* note 3, sets out the requirement to publish bylaws of the Association.
10 *Supra* note 1.
11 *Supra* note 6, s. 16.

Environmental Law Centre Donors - 2003

The Environmental Law Centre extends its gratitude to those individuals, companies and foundations that made a financial contribution to support the Centre's operations in 2003. They are:

BENEFACTORS - $5,000 +

Alberta Law Foundation

PATRONS $2,500 - $4,999

Fraser Milner Casgrain
Imperial Oil Limited
Luscar Ltd.
Petro-Canada
TELUS

PARTNERS $1,000 - $2,499

Alberta Pacific Forest Industries Inc.
Canadian Hydro Developers, Inc.
Judith Hanebury, Q.C.
Dr. David Y.F. Ho
Nexen Inc.

FRIENDS up to $999

Ackroyd, Piasta, Roth & Day
Alberta Development Officers Association
Anonymous
Garry Appelt
ATCO Ltd.
Barrhead Fish & Game Association
Beresh Depoe Cunningham
Cindy Chiasson
City of Edmonton
Clearwater County
Davis & Company
Thomas A. Dickson
Albert J. Doberstein
David M. Duggan
Esprit Exploration Ltd.
Ferner Environment Inc.
Dr. Mary Griffiths
Thomasine Irwin
Ronald Kruhlak
Arlene Kwasniak
Debra Lindskoog
Alastair R. Lucas, Q.C.
Letha MacLachlan, Q.C.
James Mallet
Michael L.J. Morin, Q.C.
Nature Conservancy of Canada
Clifton D. O'Brien
Dr. Mary Richardson
Dennis R. Thomas, Q.C.
Donna Tingley
James Tweedie
United Way of the Alberta Capital Region
Valentine Volvo
Cliff Wallis

(Court Affirms Purpose of Alberta's EIA Process. . .Continued from Page 2)

The judgment affirms the significance of this legislated process and the responsibility of the Director as the official charged with its application. It also clarifies the applicability of the EIA process to expansions of existing facilities, without unduly restricting either economic development or regulatory discretion. The Court pointed out that subjecting the project in question to the EIA process would not necessarily have involved moving through the entire process, and also found that interdepartmental consultation did not constitute an improper delegation of discretion by the Director, but rather was a proper part of the decision-making process.

■ **Cindy Chiasson**
Executive Director
Environmental Law Centre

1 *Application to Construct Recreational and Tourism Facilities in the West Castle Valley, near Pincher Creek, Alberta* (3 December 1993), Decision Report (Alta. N.R.C.B.), Application #9201, p. 1-6.
2 R.S.A. 2000, c. E-12. Part 2, Division 1 of the Act sets out the EIA process.
3 The EIA process under EPEA provides for assessment of a "proposed activity". "Proposed activity" is defined in s. 39(e) EPEA, *ibid.*
4 *Castle-Crown Wilderness Coalition v. Flett*, 2004 ABQB 515 at para. 47.
5 *Bow Valley Naturalists Society v. Minister of Environmental Protection* (27 October 1995) Calgary 9501-10222 (Alta.Q.B.); *Syncrude Environmental Assessment Coalition v. Alberta (Energy Resources Conservation Board)* (1994), 17 Alta. L.R. (3d) 368 (C.A.).
6 *Supra* note 4 at para. 87.
7 *Ibid.* at para. 89.
8 *Ibid.* at paras. 85-86.

(Animal Welfare Law Reform. . .Continued from Page 3)

References

Canadian Federation of Humane Societies <http://www.cfhs.ca>.

E. Hughes and C. Meyer, "Animal Welfare Law in Canada and Europe" (2000) 6 Animal Law 23.

J. Sorenson, "Some Strange Things Happening in Our Country" (2003) 12:3 Social & Legal Studies 377.

■ **Elaine L. Hughes**
Faculty of Law
University of Alberta

1 R.S.C. 1985, c. C-46.
2 Canadian Federation of Humane Societies, *Brief to the Standing Committee on Justice and Human Rights re: Bill C-15*, (Section 15: Cruelty to Animals), online: Canadian Federation of Humane Societies <www.cfhs.ca/CriminalCode/C15analysis.pdf> at 2.
3 *Ibid*, Appendix B.
4 Despite some concern over the loss of the "colour of right" defence in the reforms, in fact it seems impossible to create a cruelty hypothetical in which such a defendant would not have available a mistake of fact defence.
5 [1978] 43 C.C.C. (2d) 458 (Que. C.A.).

(Supreme Court Rules in Favour...Continued from Page 5)

What this decision demonstrates is that the *Patent Act* and most of the existing case law is massively ill-suited to address the new considerations raised by many biotechnology inventions. These include the overwhelming importance of natural processes to the inventions and the ability of the organisms involved to self-reproduce. Granting monopoly rights to the use of seed and plant matter, which was the practical result in *Schmeiser*, means a stunning increase in the scope of patent protection. It also means a significant transfer of economic interests from the agricultural community to the biotechnology industry.[2]

The dissent recognized that decisions affecting legal rights and economic interests so profoundly should be left to Parliament. The majority asserted this same point, but relied on existing case law and a narrowly purposive reading of the *Patent Act* to come to a contradictory result. After the *Harvard College* case, it appeared that until Parliament stepped in to reform Canadian patent laws, the courts would narrowly construe patent claims to inventions involving higher life forms. *Schmeiser* indicates a significant shift in the majority justices' approach:

> [The court's] task...is to interpret and apply the *Patent Act* as it stands, in accordance with settled principles. Under the present Act, an invention in the domain of agriculture is as deserving of protection as an invention in the domain of mechanical science. Where Parliament has not seen fit to distinguish between inventions concerning plants and other inventions, neither should the courts.[3]

The need for Parliament to address these issues through law reform has never been more pressing.

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

1 *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45.
2 *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34 at para. 165.
3 *Ibid* at para. 94.

(Water, Water Everywhere. . .Continued from Page 6)

Conclusion

Ultimately, the Board upheld the Preliminary Certificate, subject to several changes. The total volume of water allocated was reduced and may be further reduced subject to a comprehensive alternatives report.[14] The Board also varied the required minimum residual flow level, adding on an additional safety margin of 10 percent to provide supplementary protection for other water users and the aquatic environment.[15] The Board's recommendations were accepted by the Minister of Environment by Order dated May 18, 2004.

The Capstone decision introduces a more precautionary approach to water allocation in Alberta, especially for uses that effectively remove water from the hydrological cycle. The policy which the Board encourages the Government to create will, hopefully, reflect the realization that, as submitted by the Appellant, Mountain View Regional Water Services Commission, "there are alternatives to oil but no alternative for water."[16]

■ **Lisa Semenchuk**
Research Assistant
Environmental Law Centre

1 R.S.A. 2000, c. W-3.
2 *Mountain View Regional Water Services Commission et al.* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Capstone Energy* (26 April 2004), Appeal Nos. 03-116 and 03-118-121-R (A.E.A.B.) at para. 164.
3 *Ibid* at para. 163.
4 *Ibid* at paras. 165-166.
5 *Ibid* at para. 236.
6 *Ibid* at para. 185.
7 *Ibid* at para. 186.
8 Alberta Environment, *Groundwater Evaluation Guideline* (Edmonton, Alberta Environment, 2003).
9 *Supra* note 2 at para. 175.
10 *Ibid.*
11 *Ibid* at para. 177.
12 *Ibid* at para.214.
13 *Ibid.*
14 *Ibid* at paras.188-191.
15 *Ibid* at para. 203.
16 *Ibid* at para. 93.

By James Mallet, *Environmental Law Centre*

Launching a Private Prosecution

A private prosecution is a legal action brought in the criminal courts for a violation of the *Criminal Code*[1], another federal or provincial law, or a municipal bylaw. This article addresses two key steps in a private prosecution: laying an information and participating in a process hearing.

Laying an information

Any individual has the right to appear before a Justice of the Peace (JP) or Provincial Court Judge to lay an information, which is a document alleging that a person or organization committed an offence at a particular time and place.[1]

An information may only be laid where the informant has "reasonable grounds to believe" the allegations are true.[2] It is preferable for the information to be laid by a person with first-hand knowledge of the alleged offence. However, a person who has received credible evidence of a suspected offence from a person who does have personal knowledge, or from reasonable, authentic documents such as monitoring results, may also have "reasonable grounds to believe".

Commencing a prosecution is a serious matter, as it exposes the alleged offender to the possibility of criminal penalties and the stigma of as yet unproven charges. It is therefore important to gather the basic evidence needed to support the charge before laying an information. This may include lab analysis of properly collected samples, any relevant documentary evidence, and the testimony of witnesses.

The process hearing

At the time an information is received, a time will normally be set for a process hearing. The purpose of the hearing is for the Judge or JP to determine whether there is any evidence on each of the essential elements of the offence.

If the Judge or JP is satisfied with the evidence and that the charges were not brought for an improper purpose, he or she will issue "process" compelling the appearance of the accused.[3] This is done by issuing a summons requiring the accused to appear before the Court at a specified date and time to answer to the charges.[4]

It is likely that, in spite of recent amendments to the Code, the public will continue to be excluded from process hearings (they will be held *in camera*).[5]

The *Criminal Code* no longer expressly requires that process hearings on private informations be held in the absence of the accused (*ex parte*).[6] Although there is no requirement to notify the accused of the hearing, doing so is advisable as a matter of courtesy unless there is a reason to exclude the accused. However, if the accused is present, the Judge or JP may give the accused the opportunity to address the court.

The judicial officer is required to issue process if he or she considers that a case is made out.[7] However, recent changes to the *Criminal Code*[8] authorize a judge or designated justice of the peace to issue process only where he or she

a) has heard and considered the allegations of the informant and the evidence of witnesses;
b) is satisfied that the Attorney General[9] has received a copy of the information;
c) is satisfied that the Attorney General has received reasonable notice of the hearing under paragraph (a);
d) has given the Attorney General an opportunity to attend the hearing under paragraph (a) and to cross-examine and call witnesses and to present any relevant evidence at the hearing.[10]

The informant will therefore need to give the provincial Attorney General reasonable notice of the hearing. Notice should be given as soon as possible, and it is suggested that where a violation of federal law is alleged the Attorney General of Canada also be notified.

If, after the process hearing, the Judge or JP refuses to issue process, no other process hearing may be held with respect to the alleged offence unless there is new evidence to support it.[11] The informant may no longer simply take either the existing (or a newly sworn) information before another Judge or JP with the same evidence. However, the judicial officer must provide brief reasons for refusing process.[12]

The need for legal assistance

The informant has the right to lay an information and conduct a process hearing without a lawyer. However, the assistance of a lawyer is important to ensuring your information meets legal requirements, and to ensuring you have sufficient evidence to convince a Judge or JP to issue process. If possible, it is strongly advisable to have a lawyer present at the process hearing to present your evidence and answer any questions.

Note: The second edition of *Enforcing Environmental Law: A Guide to Private Prosecution* will be published by the Environmental Law Centre in December, 2004.

1 R.S.C. 1985, c. C-46.
2 *Ibid.*
3 *R. v. Devereaux*, [1966] 4 C.C.C. 147 (Ont. C.A.).
4 *Criminal Code*, *supra* note 1, s. 507.1(2).
5 *Southam Inc. v. Coulter*, (1990), 60 C.C.C. (3d) 267 (Ont. C.A.).
6 Criminal Code, *supra* note 1, s. 507.1.
7 Criminal Code, *ibid*, s. 507.1(2).
8 *An Act to Amend the Criminal Code and to Amend Other Acts*, S.C. 2002, c. 13 (proclaimed in force July 23, 2002).
9 The provincial Attorney General: *Criminal Code*, *supra* note 1, s. 2.
10 *Criminal Code*, *supra* note 1, s. 507.1(3).
11 *Criminal Code*, *ibid*, s. 507.1(7).
12 *R. v. Maitland* (1984), 42 C.R. (3d) 206 (Ont. H.C.J.).

Ask Staff Counsel

Conservation Easements – Benefits and Barriers

Dear Staff Counsel:
Why would I, as a landowner, want to enter into a conservation easement, and what are the benefits or barriers that I might encounter?

Yours truly, Land Conserver

Dear Land Conserver,

Introduction

In 1996, the *Environmental Protection and Enhancement Act*[1] (EPEA) was amended to allow for the creation and registration of conservation easements. Essentially, the legislation provides that a landowner can enter into a binding agreement with a qualified organization to preserve the land's environmental or natural scenic values. The agreement involves a donation or sale by the landowner of certain rights over the land in question (an "easement") to the organization. The agreement can include recreational, open space, educational, and research uses that are compatible with the broad conservation objectives set out in the legislation.

Benefits

The conservation easement agreement provides numerous benefits to the landowner. While use of the easement lands is restricted to retain environmental or esthetic values, the landowner retains title to the land. The agreement is flexible, and can be tailored to meet the specific needs of the landowner and the organization that will hold the easement. In most cases, the landowner and the organization negotiate the restrictions that will apply and any activities that will be specifically allowed. Once properly registered, the agreement is binding on all future owners of the land. This means that unless it is terminated or modified by mutual agreement, the easement can be enforced against all future owners by the easement holder.

There are also potential tax benefits to the landowner.[2] At the municipal level, in some cases the creation of an easement will lower property taxes on the land.[3] Federally, Environment Canada's Ecological Gifts Program provides tax incentives for donations of land that qualifies as an "ecological gift".[4] The ecological sensitivity of the property must first be certified according to specific national and provincial criteria.

Barriers

Although the number of easements in Alberta has grown steadily since 1996, the process remains poorly understood by many landowners. Although not complex, the process is subject to important legal requirements and formalities, and can be a little intimidating. Landowners may also resist the idea of a conservation easement because of concerns over loss of land value, liability, or monitoring and enforcement. Successful negotiations can take a long time, with most conservation easements taking six months to a year to finalize.

Another consideration is the cost of appraising the land. It is important to know the fair market value of the land, whether it is sold or donated, for income tax purposes. Other potential costs include legal fees and fees for professional tax advice. The entire process can cost several thousand dollars.

Solutions for an effective agreement

At the outset, it is important to consider what you want to achieve by donating or selling an easement. With these goals in mind, contact one of the major qualified organizations for further information and guidance.[5] You will want to satisfy yourself that the goals of the organization are compatible with yours, and that the organization has the experience and monitoring and enforcement capacity to ensure compliance over the long-term.

After an initial exchange of information, be prepared for further discussions regarding such matters as restricted and allowed activities, monitoring, enforcement and dispute resolution mechanisms in the event of a problem.

It is also advisable to obtain tax or financial planning advice fairly early on in the process. An easement can be established through a will, although it is best to have made arrangements for proper implementation of this wish prior to the will coming into effect.

To ensure that your objectives and those of the organization are achieved, and to prevent misunderstandings and avoid potential conflicts, it is important that the agreement be carefully drafted. The major qualified organizations have draft agreements to assist in this regard.

Prepared by:
Keri Barringer
Staff Counsel

1 R.S.A. 2000, c. E-12, ss. 22-24.

2 For a full review of potential tax benefits, see Southern Alberta Land Trust Society, *Conservation Easements: A Landowner's Guide* and *Conservation Easements and Income Tax: What are the Benefits?* (High River, Alta: SALTS, 2000).

3 This is not always the case. For guidance on this point, see Arlene Kwasniak, *Conservation Easement Guide for Alberta* (Edmonton: Environmental Law Centre, 1997) at 11.

4 For further information see the Environment Canada Ecological Gifts Program website at <www.cws-scf.ec.gc.ca ecogifts>.

5 For example, Ducks Unlimited Canada (for wetlands and upland bird habitat) online at <www.ducks.ca> or (780) 489-2002 (Edmonton) or (403) 201-5577 (Calgary), Nature Conservancy of Canada at <www.natureconservancy.ca> or 1-877-262-1253, or the Southern Alberta Land Trust Society at <www.salts-landtrust.org> or 1-877-999-7258. Information on conservation easements is also available through the Environmental Law Centre.

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.