

# News Brief

ENVIRONMENTAL LAW CENTRE

Vol. 19 No. 4 2004  
ISSN 1188-2565

204, 10709 Jasper Avenue  
Edmonton, Alberta T5J 3N3

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Environmental Law Centre

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1982 – 2004

## NRCB Approval Leaves Unanswered Questions

*Agrium Products Inc., Phosphogypsum Storage Expansion, Redwater, Alberta, Decision Report NR2004-01 (N.R.C.B.)*

A recent decision of the Natural Resources Conservation Board (NRCB or the Board) has raised serious questions about the role of environmental assessment in government decision-making. The decision also raised concerns about the willingness of the Board to approve projects in the absence of credible science concerning potential health and environmental effects.

### Background

In the late 1990's, Agrium identified a need to expand its on-site storage area for phosphogypsum, a byproduct of the phosphate fertilizer produced at the company's Redwater facility north of Edmonton. Alberta Environment determined that the expansion required an environmental impact assessment and report under the *Environmental Protection and Enhancement Act*<sup>1</sup> (EPEA), which Agrium completed in 2003. That same year, an additional hurdle was imposed on Agrium when provincial Cabinet designated the project as one requiring review by the Natural Resources Conservation Board.

Under the County of Strathcona's Industrial Heartland Area Structure Plan, intensive industrial development in the area surrounding the Agrium facility has boomed. Residents in the area have become increasingly concerned about real and potential environmental, social and health effects of this development, and downward pressure on property values.

A public hearing on the project was held before the NRCB in Fort Saskatchewan in February and March of 2004. Two groups of residents and one individual resident intervened to oppose the proposed expansion.

### The issues and the decision

The Board addressed a wide variety of health and environmental concerns in its review, including noise, air quality, water quality, vegetation, animal and human health, and reclamation. The Board also examined the economic benefits of the proposed expansion to the community, and the land-use conflict between residents and industry. After reviewing the evidence on these issues, the Board found the expansion to be in the public interest, and approved it, subject to two conditions. First, Agrium will be required to undertake or commission studies to better understand the fluoride emissions from its current and expanded operations, and to develop mitigation strategies if those studies show that there are adverse effects. Secondly, the company is required to develop a comprehensive reclamation plan for the expanded facility.

### Gaps in Agrium's data, assessment, and plan

The decision is notable for its frank criticism of Agrium's data and risk assessments on key environmental and health concerns. Concerning radon, a suspected carcinogen, and fluoride,

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**Environmental Law Centre  
News Brief**

Volume 19 Number 4 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 Lindscoog

**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

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Environmental Law Centre  
(Alberta) Society  
204, 10709 Jasper Avenue  
Edmonton, Alberta  
Canada T5J 3N3

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

which is potentially toxic, the Board found that Agrium's data on current and projected emissions from the plant were insufficient. As a result of these deficiencies, the Board found that it could not rely on Agrium's environmental and health risk assessments. It concluded that the company's understanding of fluoride emissions and impacts was poor and surprisingly rudimentary.<sup>2</sup>

However, the Board went on to find that there was no significant risk to the public from either radon or ambient fluoride. The Board also found that there was no immediate risk to vegetation or livestock (which affect human health through ingestion), but stressed the need for Agrium to study the impact of fluoride emissions on these receptors and to investigate ways to reduce the emissions.

Concerning reclamation, the Board found Agrium's plan to be inadequate, and expressed disappointment in the company's lack of scientific rigour.<sup>3</sup> The NRCB observed that the company lacked a complete understanding of the waste material involved. However, the Board concluded that reclamation concerns and remaining uncertainties over fluoride could be addressed by attaching conditions to their approval that will require Agrium to undertake further research and develop a comprehensive reclamation plan.

Throughout its decision, the Board commended Agrium for its expressed willingness to address the problems raised by the intervenors. The Board appeared to rely heavily on the ongoing commitment of the company to mitigate any adverse effects from its existing and proposed facilities. There was, however, no evidence presented at the hearing as to what feasible measures could be taken to mitigate emissions. Rather than attach conditions to its own approval to address the majority of the intervenors' concerns, the Board was satisfied to recommend conditions to Alberta Environment, who must issue an approval before Agrium's expansion can begin.

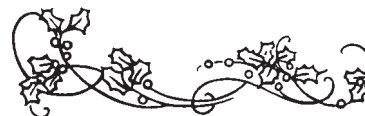
**Comment**

One of the key purposes of the environmental assessment process is "to integrate environmental protection and economic decisions at the earliest stages of planning an activity."<sup>4</sup> Agrium's environmental assessment report, which was a critical component of its application for NRCB approval, failed to provide the NRCB with a clear picture of the likely environmental and health effects of the proposed expansion. Given the level of concern over these effects, it is unfortunate that the Board has largely deferred the management of environmental and health concerns to Alberta Environment. The Agrium expansion is now far beyond "the earliest stages of planning", and final approval appears to be a foregone conclusion in spite of significant uncertainties. A better, precautionary approach would require a complete understanding of potential impacts before any approval is granted.

The environmental assessment process is also meant to predict environmental and social consequences of a project, assess plans to mitigate adverse impacts, and involve the public in reviewing the project.<sup>5</sup> The Board's conditional approval of the project in spite of an incomplete environmental assessment frustrates the predictive value of the process.

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*The opinions in News Brief do not necessarily represent the opinions of the members of the News Brief Advisory Committee or the Environmental Law Centre Board of Directors. In addition, the opinions of non-staff authors do not necessarily represent the opinions of Environmental Law Centre staff.*



*The Staff of the Environmental Law Centre extend sincere wishes to all our readers for a joyous holiday season and a safe and prosperous New Year.*

## *News Brief* Conversion

*News Brief* readers will see a significant change in the format and delivery of the Centre's newsletter in 2005. This issue is the last to be produced by the Centre in print format. In the first quarter of 2005, the Centre will launch a wholly electronic version of *News Brief* on its website <<http://www.elc.ab.ca>>, accessible free of charge.

*News Brief* will be housed on its own page on the website, under the Publications heading. The page will include both current and archived issues, available either as an entire issue or as separate articles. Individual articles can be downloaded in HTML or PDF formats, to suit users' needs and computer capacities. Included in the archives are electronic versions of past print issues from 1998 through 2004 (Volumes 13 – 19). Limited print issues from Volumes 13-19 will be available for purchase from the Centre.

From 2005 forward, the Centre will publish its electronic *News Brief* on a bimonthly basis, a change from the quarterly publication schedule of the print version. The increased frequency will enable the Centre to comment and report on environmental law developments in Alberta and Canada in a more timely fashion, and the web-based format will facilitate greater flexibility and variety in article presentation and formatting. Users will be able to subscribe for e-mail notices of new postings to the *News Brief* page, allowing them to keep current in a convenient and straightforward fashion.

*News Brief* will retain long-term features such as "In Progress", "Practical Stuff" and "Ask Staff Counsel", although these columns may not appear in every electronic issue. It will also continue to provide the high quality and well-reasoned case commentaries, legislative reviews, legal analysis and suggestions for environmental law reform that have been an ongoing hallmark of the Environmental Law Centre.

The Environmental Law Centre would like to thank Redengine for its work on creation of the *News Brief* page and the Alberta Law Foundation for its funding support of *News Brief's* conversion to electronic format.

Alberta **LAW**  
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## In the Legislature...

### **Federal/Alberta Initiative**

The governments of Canada and Alberta are inviting comments on the renewal of the *Canada-Alberta Agreement for Environmental Assessment Cooperation* that was signed in June 1999 and expired on June 24, 2004. The Agreement provides for cooperation between provincial and federal agencies when reviewing the environmental effects of projects that require an assessment by both levels of government. A draft agreement and Table of revisions are available, as is a Discussion Paper *Towards a Renewed Canada-Alberta Agreement for Environmental Assessment Cooperation*. These documents can be accessed via the website <[www.ceaa.gc.ca/010/0001/0003/0001/0001/index\\_e.htm](http://www.ceaa.gc.ca/010/0001/0003/0001/0001/index_e.htm)>. The deadline for comments was September 30, 2004.

Of related interest, the federal Minister of the Environment and Ontario's Environment Minister announced the signing of the *Canada-Ontario Agreement on Environmental Assessment Cooperation* on November 1, 2004. The federal government now has environmental assessment cooperation agreements with British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, and the Yukon.

### **Alberta Regulations**

The *Code of Practice for Pits*, pursuant to the *Environmental Protection and Enhancement Act* and the *Conservation and Reclamation Regulation* is in force as of November 1, 2004.

Amendments to the *Activities Designation Regulation*, AR 276/2003, are in force as of November 1, 2004.

The amendment regulation, AR 142/2004, specifies definitions for the purposes of Division 3 of Schedule 2, specifically for 'borrow excavation', 'exploration operation', 'infrastructure', and 'pit'. The amendment also adds some transitional provisions.

Effective July 15, 2004, the *Ammonite Shell Regulation*, AR 59/89, under the *Mines and Minerals Act* has been replaced by AR 152/2004.

### **Manitoba Regulations**

Effective July 20, 2004, the *Riparian Property Tax Reduction Regulation (2004)*, Manitoba Regulation 135/2004, is in effect. The Regulation is further to *The Property Tax and Insulation Assistance Act* and pertains to eligible former crop land which is not granted a tax reduction under either of the 2002 or 2003 regulations. The Manitoba Government also announced that it is extending the riparian tax credit to include lakeshore properties. Further information is available in the press release on the website <[www.gov.mb.ca/chc/press/top/2004/07/2004-07-26-02.html](http://www.gov.mb.ca/chc/press/top/2004/07/2004-07-26-02.html)>.

## Cases and Enforcement Action...

The Alberta Natural Resources Conservation Board issued a decision in the review hearing into the *Erik Meinders and Meinders Farm NRCB Application FA02001*. The Board denied the application while noting the unique circumstance of the case. In its decision, the Board upheld the amended Municipal Development Plan's buffer zone around a recreational area and noted the unique features of the recreational area. The Board also issued a Costs Decision pertaining to the application in which it denied costs and reported that: "The Panel takes as a starting point the proposition that unless the legislature has expressly granted the Board the power to award costs in connection with an *AOPA* review, it does not have that power hence it cannot award costs."

The Sierra Legal Defence Fund, on behalf of a coalition of conservation groups, applied for judicial review of the failure of the federal Minister of Fisheries and Oceans to comply with responsibilities under the *Canadian Environmental Assessment Act* by not requiring an adequate environmental impact assessment of the Cheviot Coal Mine Project near Jasper. The coalition of groups filed a further action on November 2, 2004 requesting that the federal government's authorization of the Cheviot Creek Development, the first part of the mine, should be quashed as it would result in the destruction of sensitive migratory bird habitat in violation of the federal *Migratory Birds Convention Act, 1994*. Both cases are expected to be heard in early 2005.

The Supreme Court of Canada granted leave to appeal in *Mikisew Cree First Nation v. Sheila Copps, Minister of Canadian Heritage, et al.* The case centers on whether the federal government violated aboriginal treaty rights by authorizing a road through Wood Buffalo National Park. Road construction has not commenced.

Notice has been issued that Alberta Environment intends to appeal the recent Court of Queen's Bench decision in *Castle-Crown Wilderness Coalition v. Flett*. In this decision dealing with judicial review of the decision not to require an environmental impact assessment of the expansion of the Castle Mountain Resort, the Justice noted that both the Director's and the Minister's decisions were 'patently unreasonable' and referred the matter back to the Director.

■ **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>>.

# Municipal Law – Is it Increasing Environmental Protection?

*Enterprises Sibeca Inc. v. Frelighsburg (Municipality)* 2004 SCC 61

To some, municipal law and environmental protection may seem to be at odds with each other. Often municipal law is a subject that is addressed on the basis of individual knowledge and interest by those making the decisions who have discretionary powers. Sometimes it can be a long battle for those who have advocated for protection of the natural environment in their communities or cities, only to feel that their efforts have been unfounded when a development approval is issued or a wetland or sensitive ecosystem is lost to the development process. *Sibeca* is an interesting decision because the Supreme Court of Canada (SCC or the Court) recognized the jurisdiction of municipal governments to consider environmental conservation in their decision making if they so choose. This case considered changes to a zoning bylaw for environmental protection purposes that had a negative effect on the value of the lands affected.

## Background and analysis

In 1988 a number of advocates for conservation of Mount Pinacle, Quebec had contested an approval in principle given to a developer for development of a recreational and real estate project. The project was delayed for a few years. In 1993 some of the conservation advocates were elected to the municipal council, and in 1994, the council adopted an amended bylaw that put further restrictions on the developer's residential development plans. By the time the new bylaw was adopted, the developer's original building permits had expired, and no application was made for renewal. The developer then sold its land and claimed against the municipality for loss of profits. The Superior Court of Quebec determined the developer's rights to build had been blocked by the 'bad faith' of the administration, and awarded damages of \$330,500. The Court of Appeal set this decision aside, and the SCC agreed with its decision.

The SCC acknowledged that a municipality has broad discretion with respect to its regulatory powers and public law. A municipality cannot be held liable if it acts in good faith. The Court recognized that amending the zoning bylaw had a purpose to protect the natural environment, was within the municipality's jurisdiction, and was compatible with the area development plan. It also determined that the objectives of the amendment were in the municipal interest. The Court said there was no concept of administrative bad faith, and as long as the council was comprised of councilors acting in good faith, the adopted municipal bylaw was made in good faith.

With respect to environmental considerations, the Court further noted that as long as a zoning bylaw is compatible with the development plan for the area, the municipality may regulate development and promote the objectives it believes to be in the municipal interest. In this case the amended bylaw was declared compatible with the development plan. The Court went on to recognize that "although there is specific legislation dealing with environmental conservation, protecting the natural environment within its jurisdiction cannot be regarded as an improper goal for a municipal council."<sup>1</sup> It went on to say that public identification of some councilors with conservation of the area did not make the objective improper.

The dissenting opinion, which agreed with the majority on disposition of the case, held that the developer had broken all causal connection with regard to civil liability of the council because of the expired permits. It was therefore not possible to preserve its previous authorizations against the amended bylaw.

## Discussion

This case reflects other decisions where a court or administrative body has determined, at least in part, that a decision in favour of protecting the environment or health is within the proper jurisdiction of municipalities. In 1991, the Town of Hudson, Quebec, enacted a bylaw that restricted the use of pesticides within that municipality. Although limited uses were allowed, cosmetic use for purposes of landscaping and lawns was denied. This action was challenged as *ultra vires* the municipality's authority but was unsuccessful at all levels of court.<sup>2</sup>

In that decision, the SCC broadly interpreted a section of the Quebec *Cities and Town Act* that enables councils to enact bylaws for the peace, order, good government, health and general welfare of the municipality.<sup>3</sup> It found the bylaw properly within the decision making power of a local government because it concerned the use and protection of the local environment in the community. Of further relevance, this case cited sections of the Alberta *Municipal Government Act* that refer to 'developing and maintaining safe and viable communities, and bylaw making powers respecting safety, health and welfare of people and the protection of the people and their property'.<sup>4</sup> Since the SCC specifically mentioned Alberta, and other municipal enabling legislation, it can be interpreted the case has application outside of Quebec.<sup>5</sup> The SCC also endorsed the 'precautionary principle' providing that when there are serious threats to the environment, lack of complete scientific evidence should not be used to postpone measures to prevent the harm or degradation.

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## EAB to Consider Changes to Cheviot Project

*Preliminary Motions: Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (8 October 2004) 03-150, 03-151 and 03-152-ID1 (Alberta E.A.B.)

A recent decision of the Environmental Appeals Board (EAB) clarifies the EAB's jurisdiction to address matters previously reviewed and the EAB's approach to standing. However, some of the commentary on standing highlights inconsistencies between principles developed by the EAB in past decisions.

### Factual background

The decision concerns appeals by Ben Gadd of an approval issued under the *Water Act* and two amending approvals issued under the *Environmental Protection and Enhancement Act*, all related to a haul road for the Cheviot coal mine project. The Cheviot project had previously undergone extensive review, including two joint Alberta Energy and Utilities Board – Canadian Environmental Assessment Agency hearings in 1997 and 2000, a subsequent permit from the Energy and Utilities Board, and two approvals from Alberta Environment.

As originally reviewed and approved, the project included upgrading of an existing road and rail line. The project was held in abeyance by the approval holder until 2003, at which time it applied for the amending approvals and the *Water Act* approval. Under its revised plan to use an existing coal processing facility rather than build a new one, the approval holder sought to develop a new haul road to the existing facility. This new road is the subject of Gadd's appeals.

### Jurisdiction

At the preliminary meeting, the approval holder challenged the EAB's jurisdiction to hear Gadd's appeal on two bases, both related to previous reviews of the project. As mentioned above, the project had been reviewed twice in joint hearings of the Alberta Energy and Utilities Board and the Canadian Environmental Assessment Agency. It was also the subject of a new permit issued by the Energy and Utilities Board in 2003 to allow development of the haul road. The approval holder relied on provisions of the *Environmental Protection and Enhancement Act* directing the EAB to dismiss a notice of appeal if:

- the person filing the notice of appeal had received notice of, participated in or had the opportunity to participate in a hearing or review under legislation administered by the Energy and Utilities Board, at which all matters dealt with in the notice of appeal were adequately addressed;<sup>1</sup> or
- the provincial government had participated in a public review under the federal *Canadian Environmental Assessment Act* regarding all matters included in the notice of appeal.<sup>2</sup>

Given the history of the project, the approval holder argued that both of these provisions applied to preclude the EAB from hearing Gadd's appeals.

The EAB carefully reviewed the project history and the earlier statutory reviews in relation to the haul road. With respect to the newest permit issued by the Energy and Utilities Board, the EAB held that because that Board had not held a hearing regarding the haul road permit and the haul road had not been part of the applications for previous project permits from that Board, the matters raised in Gadd's notice of appeal had not been adequately addressed in those proceedings. In relation to the two joint hearings of the Energy and Utilities Board and the Canadian Environmental Assessment Agency, the EAB found that the haul road had been rejected by the approval holder in its earlier applications and environmental impact assessment as not being a viable option. Given that, the EAB felt that the haul road had not been considered in those hearings, leaving the road and Gadd's appeals within its jurisdiction to hear. The EAB stated:

If the proponent of a project decides to make fundamental changes to the project after it has been reviewed, it should not complain if a new hearing is held to consider the effect of those changes on the environment. It would lead to absurd results if such changes could not be questioned on the basis that the overall project had previously received approval without consideration of the elements of the project that have been changed.<sup>3</sup>

### Standing

Gadd argued at the preliminary hearing that he is directly affected by the approval and amending approvals granted for the haul road, due to his professional use of the area as an interpretive guide offering ecotourism trips and his own recreational use. He indicated that the haul road would affect his use of the area's natural resources and have the possibility of causing environmental effects that could affect his livelihood. The approval holder opposed these arguments, stating that Gadd's use of the area was not sufficient to consider him directly affected by the haul road.

In finding Gadd directly affected and granting him standing, the EAB indicated that "the more ways in which the appellant is affected, the greater the possibility of finding the person directly affected".<sup>4</sup> In this case, the EAB focused primarily on Gadd's economic interest resulting from his guiding business.

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It indicated that the magnitude of impact from an activity on an appellant's personal interest is irrelevant in determining directly affected status, and that in Gadd's case, it was enough for him to show that a portion of his income came from tours in the area of the haul road, without quantifying the proportion of income that he realized from tours in that area. The EAB also indicated that while a property interest could be a helpful indicator of personal interest, it was not required evidence to establish directly affected status. Gadd did not own property in the area of the haul road, nor did he hold any type of permit in relation to his guiding business.

### Conflicting principles

The EAB's discussion of interests sufficient to establish directly affected status highlights an inherent conflict between "directly affected" and the EAB's emphasis on the purpose sections of the *Water Act* and *Environmental Protection and Enhancement Act* in determining standing. The EAB has often indicated that the interest claimed by an appellant as being affected by an activity in question "must be something more than the generalized interest that all Albertans have in protecting the environment."<sup>5</sup> As well, the EAB has in many cases indicated that an interest claimed by an appellant to be affected will be more persuasive if it "is supported by the statutes, such as being included in the purpose sections of the acts".<sup>6</sup>

However, while past decisions have placed emphasis on economic interests as being supported by clauses in the purpose sections referring to economic growth and sustainable development, thus far the EAB seems to have overlooked that the purpose sections of both the *Water Act* and *Environmental Protection and Enhancement Act* refer to the "shared responsibility of all Alberta citizens" for water conservation and management and environmental protection, in relation to finding interests sufficient to establish directly affected status.<sup>7</sup> Interestingly, the EAB does recognize and make reference to the "shared responsibility" clauses as a justification for limiting or refusing costs claims by appellants.<sup>8</sup>

It can be argued that by attaching the "directly affected" qualifier to standing before the EAB, the Legislature chose to limit the application of the "shared responsibility" purpose clauses. However, it appears that the EAB has been applying standing tests that are too restrictive and that it should properly be looking to an appellant's history of actions and concerns in relation to environmental protection and the matter in question before it as part of assessing whether that person is directly affected.

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

<sup>1</sup> *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 95(5)(b)(i).

<sup>2</sup> *Ibid.*, s. 95(5)(b)(ii).

<sup>3</sup> *Preliminary Motions: Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (8 October 2004) 03-150, 03-151 and 03-152-ID1 (Alberta E.A.B.) at para. 90.

<sup>4</sup> *Ibid.* at para. 66.

<sup>5</sup> *Ibid.* at para. 68.

<sup>6</sup> *Ibid.* at para. 69.

<sup>7</sup> Regarding purpose section clauses related to economic growth and sustainable development, see *Water Act*, R.S.A. 2000, c. W-3, s. 2(b) and *Environmental Protection and Enhancement Act*, *supra* note 1, s. 2(b) and (c). Regarding purpose section clauses related to shared citizen responsibility, see *Water Act*, s. 2(d) and *Environmental Protection and Enhancement Act*, s. 2(f) and (g).

<sup>8</sup> *Costs Decision re: Kievit* (12 November 2002) 01-097, 098 and 101-CD (Alberta E.A.B.) at para. 33; *Costs Decision re: TransAlta Utilities Corporation* (13 February 2003) 01-082, 01-084, 02-002 and 02-003-CD (Alberta E.A.B.) at paras. 30-31; *Costs Decision re: Maga* (27 June 2003) 02-023, 024, 026, 029, 037, 047 and 074-CD (Alberta E.A.B.) at para. 109.



## ELC Assessment of EAB Accessibility Nears Completion

The Environmental Law Centre has been working on a project to assess the accessibility of the Environmental Appeals Board (EAB) process for individuals and non-governmental organizations. Since its inception in 1993, the EAB has been touted as a forum for Albertans to participate in environmental decision-making. In its 1997 evaluation, the EAB indicated that one of its purposes is to give the public a voice with respect to the environmental effects of activities occurring in Alberta.<sup>1</sup> Additionally, both the *Environmental Protection and Enhancement Act* (EPEA) and *Water Act* (WA) set out as purposes roles for the public in providing advice on environmental matters and exercising a “shared responsibility” to ensure environmental protection and the wise use of water.<sup>2</sup> The Environmental Law Centre project tests whether these purposes are being realized on a practical basis, by examining three key accessibility issues: standing, practice and procedure, and costs.

### Project methodology

The project work incorporates review of legislation, regulations and guidelines related to the EAB. The Centre has also reviewed relevant EAB decisions and judicial review decisions arising from EAB matters, focusing on the accessibility issues mentioned above. Additionally, Centre staff conducted interviews with various parties involved with the EAB, including appellants and counsel who have appeared on behalf of appellants. These interviews covered a wide range of topics related to participation by individuals and non-governmental organizations, including their understanding of EAB process; their ability to make an effective case; their interaction with the EAB, Alberta Environment and staff of both bodies; monetary and other costs of participation, including effects on personal and work life; and their willingness to participate in the EAB process in the future.

### Preliminary findings

The initial project findings reveal that individuals and non-governmental organizations do experience difficulties in accessing and participating in the EAB process. Standing is a problematic area that is not well understood by appellants; various interviewees indicated that it was difficult to predict whether they would get standing. In particular, concerns arise from the ongoing tension between Alberta Environment and the EAB in relation to the determination of “directly affected” status.<sup>3</sup> Appellants are often frustrated by the need to address this matter twice during the regulatory process, before different bodies and in answer to different tests. Gaining standing has been particularly challenging for groups.

The project findings also raise a variety of concerns regarding EAB practice and policy. Appellants found the process to be complex and overly formal and legalistic, making it difficult to participate without legal representation. Timelines established by the EAB in relation to filing documents, responding to correspondence and carrying out examination and cross-examination at hearing often do not take into account the limitations and capabilities of the appellants. Generally, there is limited public awareness and understanding of the EAB’s role and its process.

The EAB’s practice with respect to costs has also been a concern for individual and non-governmental organizations appearing before the Board. While the EAB has the power to award costs to any party before it, for many years it took a very restrictive approach and made few costs awards, choosing instead to have appellants bear the entire burden as part of their “shared responsibility” for environmental protection. However, in recent years, the EAB has made occasional costs awards, predominantly to partially cover legal fees in certain cases. Interviewees indicated a lack of certainty and predictability with respect to costs.

It also appears that significant accessibility issues actually arise prior to appeals, during the process of granting approvals or licences under the EPEA or WA. Alberta Environment’s approach to accepting statements of concern from directly affected members of the public is the root of various concerns, including the Department’s determination of “directly affected” status, limited notice of authorization decisions, and adversarial treatment of parties that have filed statements of concern.

### Further steps

A final project report will be published by the Centre in early 2005 and circulated widely to interested parties. The report will include recommendations for law reform. Sparked by the initial findings related to concerns about the authorization process, the Centre will also undertake a new project in 2005 to develop a citizen’s guide to Alberta’s environmental authorization and appeal processes. The guide will provide a road map of the processes under the EPEA and WA, summaries of relevant jurisprudence and practical guidance for parties seeking to participate in those processes.

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

<sup>1</sup> *Evaluation of the Environmental Appeal Board 1997 Stakeholder Consultation* (Edmonton: Environmental Appeal Board, 1997), p.2.

<sup>2</sup> See *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 2(f)-(g) and *Water Act*, R.S.A. 2000, c. W-3, s. 2(d).

<sup>3</sup> For further detail on this point, see Cindy Chiasson, “Alberta Environment Takes Restrictive View of ‘Directly Affected’” *Environmental Law Centre News Brief* 19:2 (2004) 5.



# Environmental Law Centre Donors - 2003

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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

(NRCB Approval Leaves Unanswered Questions . . . Continued from Page 2)

Furthermore, there is no requirement that the public be involved in the further studies and assessments to be carried out by Agrium and Alberta Environment, since the formal environmental assessment process is at an end.

The role of the NRCB is to determine whether natural resource and other designated projects are in the public interest, having regard to the social, economic, and environmental effects of the project.<sup>6</sup> Where the Board identifies information and risk assessment gaps and then defers to Alberta Environment to assess environmental effects and mitigation strategies, it is unclear what benefit the public can expect to gain from an NRCB hearing. The Board is well-positioned to examine the broader public-interest considerations raised by designated projects and their impacts. To do so effectively, the NRCB should only consider substantially complete applications, and should not hesitate to impose operational conditions to protect the environment and the public. Legal and practical concerns, such as the jurisdiction and ability of Alberta Environment to enforce conditions, could be resolved through discussions with that department.

On October 28, 2004, an application by the intervenors for leave to appeal the NRCB's decision was refused by the Court of Appeal. However, the Court's refusal does not proscribe the more rigorous review process recommended above. The NRCB should confirm the importance of its role by adopting a more assertive approach to its reviews.

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

<sup>1</sup> R.S.A. 2000, c. E-12, Part 2, Div. 1.

<sup>2</sup> *Agrium Products Inc., Phosphogypsum Storage Expansion, Redwater, Alberta*, Decision Report NR2004-01 (N.R.C.B.) at 85, 89.

<sup>3</sup> *Ibid.* at 90.

<sup>4</sup> *Supra* note 1, s. 40(b).

<sup>5</sup> *Supra* note 1, s. 40(c) and (d).

<sup>6</sup> *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3, s. 2.

(Municipal Law – Is it Increasing . . . Continued from Page 5)

measures to prevent the harm or degradation.

## **Conclusion**

These examples of recent case law support the recognition by various courts of municipalities enacting bylaws with an environmental protection component. In particular, the *Sibeca* decision supports protection of the natural environment as being within a municipality's regulatory jurisdiction. Future cases must be followed to determine if this support will continue across all Canadian jurisdictions.

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

<sup>1</sup> *Enterprises Sibeca Inc. v. Frelighsburg (Municipality)* 2004 SCC 61 at para. 38.

<sup>2</sup> *114957 Canada Ltd (Spraytech, Societe d'arrasage) v. Hudson (Ville)*, (2001) 40 C.E.L.R. (N.S.) 1 (S.C.C.).

<sup>3</sup> *Cities and Town Act*, R.S.Q., c. C-19.

<sup>4</sup> For further reading see Arlene Kwasniak, "Municipal Regulation of Pesticide Use" *Environmental Law Centre Newsbrief* 16:3 (2001) at 7.

<sup>5</sup> *Ibid.*

## ELC Welcomes New Staff Counsel



**Jason Unger**

The Environmental Law Centre is pleased to welcome Jason Unger to its staff as Staff Counsel, effective mid-January 2005. Mr. Unger comes to the Centre from the Alberta Wilderness Association, where he worked as a conservation specialist on issues including public lands, forestry and water, concentrating on the southern half of the province. He previously practiced law with firms in Edmonton and Calgary. Mr. Unger holds an LL.B. from Dalhousie University and a B.Sc. from the University of Manitoba. This position marks his return to the Centre, where he spent the summer of 2000 as a research assistant.

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## 2004 Mactaggart Essay Prize Winners



**Michelle Campbell**

The Environmental Law Centre is pleased to announce the winning essays for the 2004 Sir John A. Mactaggart Essay Prize in Environmental Law. The first prize was awarded to Michelle Campbell of Osgoode Hall Law School for her paper *Re-inventing Intervention in the Public Interest: Breaking Down Barriers to Access*. Second prize was awarded to Juda Strawczynski of the University of Toronto for the paper *An Evaluation of Harmonization on Environmental Enforcement in Canada*.

Members of the 2004 volunteer selection committee were: Alastair Mactaggart (Honourary); Peter Bowal, Haskayne School of Business, University of Calgary; JP Mousseau, Alberta Energy and Utilities Board, and Brian O'Ferrall, McLennan Ross.

The Mactaggart Third Fund donated the capital for this prize. Carswell and the charitable donors to the Environmental Law Centre made additional contributions.

For further information, contact Dolores Noga, Information Services Coordinator, at the Environmental Law Centre at 204, 10709 Jasper Avenue, Edmonton, AB T5J 3N3, by phone at (780) 424-5099 or 1-800-661-4238, by fax at (780) 424-5133, by email at [dnoga@elc.ab.ca](mailto:dnoga@elc.ab.ca), or check the Environmental Law Centre website at <http://www.elc.ab.ca>.

By Cindy Chiasson, *Environmental Law Centre*

## Accessing Environmental Site Assessment Information from Alberta Environment

Where land is or may be contaminated, parties dealing with that land often seek more detailed information on its environmental condition. One of the common records providing information on the environmental condition of land is the environmental site assessment (ESA) report. A Phase I ESA report is based mainly on a review of available records, and assesses the likelihood of a property being contaminated. A Phase II ESA report is produced following testing of a site for contaminants, and indicates the nature and extent of contamination on a property.

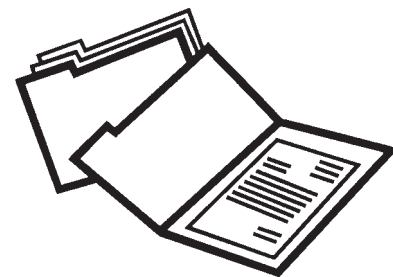
Alberta Environment is the regulator that deals with contaminated land in Alberta. Its records can include ESA reports that have been generated by it with respect to properties of concern or, more commonly, have been submitted to Alberta Environment by parties responsible in some way for contaminated land.

One way to access information from Alberta Environment is through the information disclosure provisions of the *Environmental Protection and Enhancement Act*. Section 35 of the Act lists information held by Alberta Environment that is publicly accessible. ESA reports may fall within this list if an approval holder has provided them to Alberta Environment, either in accordance with the terms and conditions of the approval or as environmental monitoring data. There are two ways to determine whether an approval is in place. One is to use the approval viewer found on Alberta Environment's website at [www3.gov.ab.ca/env/water/approvalviewer.htm](http://www3.gov.ab.ca/env/water/approvalviewer.htm); the full legal name of the approval holder (generally a corporation) is needed to get proper results from the approval viewer. The other is to telephone Alberta Environment's Regulatory Approvals Centre at 780-427-9539 (toll-free in Alberta by first dialing 310-0000).

Where someone seeks information provided by an approval holder to Alberta Environment, the government's expectation is that the first information request will be made to the approval holder. Under the *Disclosure of Information Regulation*, if the approval holder refuses to provide the information or fails to respond to the request within 30 days, a request for the information can then be made to Alberta Environment.

It is also possible to request information held by Alberta Environment or other provincial government departments under the *Freedom of Information and Protection of Privacy Act* (FOIP Act). While the FOIP Act enables the public to access a wide range of information, there are limitations on the accessibility of certain types of information. For example, information that relates to or may affect third party interests can be withheld by the provincial government in some circumstances, such as where disclosure would reveal a third party's personal information, trade secrets, or financial information. Access may also be denied if third party documents are subject to legal privilege where they are prepared and submitted for the main purpose of litigation. Often, access or its denial will depend on the particular circumstances under which Alberta Environment received the ESA reports and related information. In two cases of requests for ESA reports held by Alberta Environment, the Alberta Information and Privacy Commissioner held that the reports could not be disclosed because they were prepared in relation to anticipated litigation and thus subject to legal privilege. However, in a recent decision, disclosure of an ESA report and related information was upheld, largely because the documents had previously been disclosed to another party and were held to be in the public domain.

The first step in seeking information under the FOIP Act is to contact the FOIP coordinator for the relevant provincial government department or body. Alberta Environment's FOIP coordinator can be contacted by telephone at 780-427-4429 (toll-free in Alberta by first dialing 310-0000). The FOIP coordinator may be able to provide access to the information sought without the need to file a formal request. If the information cannot be provided informally, a written request will be required, either by using the government's FOIP request form, available at government offices and public libraries, or by writing a letter. The FOIP request form and more detailed information about making FOIP requests is also available online at [www3.gov.ab.ca/foip/foip\\_request/index.cfm](http://www3.gov.ab.ca/foip/foip_request/index.cfm). The request must provide the requester's contact information and include details as specific as possible about the information requested. An initial \$25 fee is charged for information requests, and additional costs may be imposed to reflect time incurred gathering the information or the cost of making copies. Under the FOIP Act, government departments and bodies must respond to FOIP requests within 30 calendar days of the request; this period may be extended if large amounts of information and records are involved or the request involves third party information.



## Mold Matters

*Dear Staff Counsel:*

**I am considering purchasing a house and am concerned about indoor air quality. How can I be sure that the house is free of mold?**

**Yours truly, House Purchaser**

*Dear House Purchaser,*

Molds are fungi that grow in damp environments. Buildings that have poor ventilation, leaky roofs, walls or basements, or that have experienced flooding may be particularly susceptible to mold or other microbial growth. The presence of certain types of mold in buildings has been linked to a variety of health problems, including asthma, allergies, and other symptoms such as coughing and headaches. Mold is becoming a significant issue in the purchase and sale of homes, and lawsuits against sellers of homes by purchasers that discover mold after the sale are on the rise.<sup>1</sup>

If from your inspection of the home, from the seller's comments, or from your lawyer's inquiries it appears that mold is or has been a problem, you will need to take steps to ensure you fully understand the scope of any mold contamination. If you decide to purchase, you will need to consider ways to limit your liability for ongoing or recurring problems.

### **Gathering information on the property**

If you suspect that a house may have mold problems, ask the seller or the seller's real estate agent directly, preferably in writing. Although the general rule is 'buyer beware', sellers and their agents are under a legal duty not to fraudulently or negligently misrepresent the condition of property as 'mold-free'. They are also under a duty to disclose any mold problems within their knowledge that could not reasonably be discovered by a 'duly diligent' buyer.

You may be satisfied with the seller's response to your inquiries. If there are no obvious signs of water damage or mold but some parts of the building smell musty, you will need to decide what level of risk you are willing to live with. Remember that water damage and mold can be hidden behind drywall, in attics, and under flooring.

There is no registry or other single source of information on private residential properties with mold problems. Where mold is a concern, consider retaining an environmental consultant or a building inspector to conduct an investigation and provide a technical report. Retaining an environmental consultant to do this work will generally cost \$1,000 to \$1,500. Look for a certified industrial hygienist, a registered occupational hygienist, or a consultant certified by the Indoor Air Quality Association<sup>2</sup> or the Canadian Council for Human Resources in the Environment Industry.<sup>3</sup> Consultants carry professional insurance.

The cost of retaining the services of a building inspector starts around \$300. Unlike consultants, there are no legal qualifications for inspectors. It is therefore advisable to ensure the inspector has specific experience investigating air quality concerns. Some inspectors guarantee their work for a specified period.

Listings for consultants and building inspectors are available under "environmental consultants" and "home inspection service" in your community's Yellow Pages.

### **Who pays for the investigation?**

The buyer may decide to select and retain a consultant or inspector to conduct the investigation. In some cases, the seller may agree to retain the consultant and pay for the work. Or, the seller may agree to pay but let the buyer select the consultant.

### **The purchase contract**

The buyer may negotiate specific warranties to be included in the contract. For example, the buyer may ask the seller to warrant that, to the best of his knowledge, there is no mold present in the building. The seller may also warrant that there has been no incursion of water into the building. Such clauses provide the buyer with some protection from liability for problems existing at the time of sale. Including terms in the purchase contract to address mold concerns is something you should discuss with your lawyer.

Where a consultant or inspector is retained, the contract will typically also provide that the purchase is conditional upon the buyer's satisfaction with the results of the report.

### **General information about mold**

For further information on mold and indoor air quality in general, see Health Canada's webpage "It's Your Health: Dampness, Mold and Indoor Air" on the Health Canada website at < [http://www.hc-sc.gc.ca/english/iyh/environment/indoor\\_air.html](http://www.hc-sc.gc.ca/english/iyh/environment/indoor_air.html)>. The website also provides links to additional information. General information is also available through the department's Air Health Effects Division at (613) 957-1876.

**Prepared by:  
James Mallet  
Staff Counsel**

<sup>1</sup> Guy Carpenter, "Toxic Mold: A Growing Risk?" online: Guy Carpenter <<http://www.guycarp.com>> at 35.

<sup>2</sup> Online: <<http://www.iaqa.org>>.

<sup>3</sup> Online: <<http://www.cchret.ca>>.

*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](mailto: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.*