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Judicial Scrutiny of Environmental Assessment in Alberta: Deference is the Measure of the Day

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The scope of discretion given to government decision makers in ordering environmental impact assessments (EIAs) was recently considered by two courts in Alberta. The Court of Appeal case of *Castle-Crown Wilderness Coalition v. Alberta (Director of Regulatory Assurance Division, Alberta Environment)*[1] (*Castle Mountain Resort*) involved a challenge of the government decision not to order an EIA pursuant to the provincial *Environmental Protection and Enhancement Act*[2] (EPEA) for a proposed expansion of the Castle Mountain Resort. Federally, the requirements of the *Canadian Environmental Assessment Act*[3](CEAA) were considered in the case of *Pembina Institute for Appropriate Development v. Canada (Minister of Fisheries and Oceans)*[4](*Cheviot*) dealing with the Cheviot mine outside of Jasper National Park.

In both cases the courts were called upon to determine whether the government decision not to order an EIA was lawful. Painted with a broad brush, both decisions indicate that courts will be highly deferential to government decision makers in relation to discretionary decisions dealing with environmental assessments. This deference encompasses the ability of the decision maker to rely on consultations with other government departments and the ability to decide on mitigation measures that may be required.

On a more practical level however, the cases raise questions relating to the efficacy of the environmental assessment legislation, both federal and provincial, and how courts view the purpose of such legislation.

Castle Mountain Resort and *EPEA*

The *Castle Mountain Resort* case involved a proposed expansion of existing facilities to accommodate more skiers, residents and visitors to the Castle area of southern Alberta. Prior to the most recent expansion, the previous owners of the ski hill and development company Travel Alberta applied to develop a large scale resort in the area. The proposal was reviewed by the Natural Resources Conservation Board and approved with various conditions, due in large part to various concerns about the environmental impacts. The conditions were not met and the development ended there.

The current owners more recently made their proposal for expansion of the project which attracted the challenge of the Castle-Crown Wilderness Coalition when the Alberta government indicated that no EIA was required for the expansion.

The judicial review decision – Minister and Director patently unreasonable

The Court of Qeen's Bench decision of Justice Kenny held that it was patently unreasonable for both the Director of Regulatory Assurance (Alberta Environment) and

the Minister of Environment not to require an EIA under EPEA.[5] In brief, Justice Kenny concluded that the Director's reasoning in not ordering an environmental impact assessment undermined the purpose and intent of EPEA. Justice Kenny held that the Director's conclusion not to order an EIA was patently unreasonable in light of the likely environmental impacts, particularly the cumulative impacts.[6] The Court found that while the Director could rely on the expertise provided by other government departments, the mechanisms cited by the Director to deal with cumulative environmental effects were not of a nature to replace an EIA.[7]

The Court of Queen's Bench also found that the Director's view that the expansion was not a "proposed activity" as defined by *EPEA* was patently unreasonable.

Court of Appeal finds decisions were reasonable

The Alberta Court of Appeal overturned the original judicial review decision, both in terms of the standard of review and the substantive finding of whether the standard was met. The Court of Appeal did confirm the Queen's Bench decision on whether the expansions to existing projects constituted a "proposed activity" under EPEA.

The appellate court confirmed that the expansion was a "proposed activity" under EPEA, and it appears that the Alberta Government conceded this point on appeal. The Court of Appeal, citing similar reasoning to Justice Kenny, held that any claim that the expansion was not a "proposed activity" must fail, as to interpret "proposed project" in the manner suggested by Alberta before the Court of Queen's Bench would allow small projects to expand massively without an EIA. In the words of the Court of Appeal such an interpretation "of the words of "proposed activity" could not be sustained under any standard of review."[8]

The Court of Appeal further concluded that notwithstanding the Director's view of what constituted a "proposed activity", the Director reasonably concluded that an EIA was not required. This conclusion indicates that the judiciary will give significant deference to the government decision maker when addressing relevant factors in deciding whether to order an EIA. This deference includes the ability to rely on other departments, and on other legislative and approval processes.

Unlike the Court of Queen's Bench, the Court of Appeal viewed the Director's discretion to incorporate other considerations broadly and deferred to the Director on whether these other considerations would in fact deal with issues that were identified as relevant. In effect, the Court of Appeal appeared to say that the judicial scrutiny undertaken at Queen's Bench was unwarranted due to the discretionary nature of the decision, notwithstanding the fact that the environmental issues identified by the Director could not conceivably be dealt with through the other available authorizations and legislation. The Court of Appeal simply noted, "the Director concluded that environmental concerns, with the assistance of other regulatory processes, were manageable." [9]

Cheviot* and *CEAA

Similar to *Castle Mountain Resort,* the *Cheviot* judicial review focused on whether the federal government erred when it did not order an EIA in relation to modifications to the Cheviot mine project.

In this case, there was also an earlier project that did not go ahead as planned and that had required an EIA. That EIA was prepared in 1996 for an open pit coal mine and related facilities. The original project went before two joint review panels before the proponent temporarily abandoned the project, citing market conditions. The proponent subsequently modified the project to use a haul road, as opposed to onsite coal processing.[10] The Department of Fisheries and Oceans issued *Fisheries Act* authorizations for the open pit mine (Mine Pit Authorization) without requiring a further EIA and determined that no authorizations were required for the haul road.

The applicants in this case raised four issues relating to alleged failures on the part of the responsible authority, the Department of Fisheries and Oceans (DFO). The three issues of relevance were:[11]

- that DFO erred in not ordering an EIA, as the project modification of the haul road constituted a modification of an existing project which triggered a mandatory EIA under section 15(3) of CEAA;
- that DFO erred in not ordering in an EIA as the haul road triggered an EIA; and
- that DFO erred in relation to ensuring the Mine Pit Authorization reflected the federal response to the joint review panel, with a particular focus on specific mitigation measures.

Section 15 of CEAA deals with project scoping by the responsible authority under the division dealing with Environmental Assessment Processes. Subsection 15(1) gives the responsible authority the power to scope the project for the purpose of the environmental assessment. Section 15(3), the focus of the applicants' argument, states:[12]

> (3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of
>
> (a) the responsible authority, or
>
> (b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,
>
> likely to be carried out in relation to that physical work.

The applicants argued that a plain reading of section 15(3) of CEAA imposed a mandatory requirement that an environmental assessment be undertaken because the alterations to the project constituted a "modification". In rejecting this submission the Court concluded that the haul road did not trigger an EIA as a "modification" under section 15(3) of CEAA, as one had to look at the scope of the project under section 15(1). The Court confirmed the discretion of the responsible authority to scope the project under section 15(1) and found that the project, as scoped, did not include the haul road.

Further, the Court concluded that to interpret the meaning of "modifications" under section 15(3) of CEAA to include any subsequent modification to the project would be unreasonable in its breadth, requiring an EIA for any number of modifications, regardless of their significance and timing. The Court observed further that this interpretation of "modification" does not mean that a proponent may carry out any manner of amendments without oversight, citing the fact that a modification may trigger section 5 of CEAA, which would then trigger the EIA process.

The applicants further argued that DFO erred in failing to ensure that mitigation measures were implemented in a manner that reflected the federal response to the Joint Panel's recommendations, as required by section 37.1 of CEAA. The Court concluded that the federal response did not dictate particular measures to be taken, as proposed by the applicants, and that DFO made adequate steps to address issues raised in the federal response.

Case comment

The two decisions support the view that discretionary government decisions under environmental assessment legislation will be given significant latitude. The following observations about the discretion of government officials may be made in this regard:

- The discretion of decision makers is not free of constraint; however, the decision maker will generally have great latitude in how environmental impacts are dealt with (or not) by the EIA process.

- The courts will not get into the details of how decisions are made and whether, in light of the purpose of EIAs and environmental protection legislation, they provide a rational basis for the decision.

- Project proponents and decision makers will benefit from this deference and the certainty it creates. Mounting challenges to such decisions will be difficult considering the broad discretion of the decision maker.

- Public perception of the decision making process may be negatively impacted in so far as assessments and measures to deal with environmental impacts appear to be inconsistently applied. This is particularly the case for projects (such as Cheviot and Castle Mountain Resort) that go through various iterations and receive varying degrees of government scrutiny and conditions.

Conclusion

From an environmental protection perspective the legislative framework for environmental assessments, both federally and provincially, needs to be reformed. Currently the breadth of discretion provided by the legislation and fostered by the interpretation of this legislation by the Courts greatly undermines the purpose and intent of environmental impact assessments.

Indeed, the breadth of discretion afforded decision makers is such that the legislation itself can lose meaning.[13] As a case in point, the Federal Court's interpretation of section 15(3) in *Cheviot* leaves one to wonder what meaning the word "modification" retains. If, as the Court suggests, the triggering mechanism of an altered project

remains section 5 of CEAA the legislative intent behind including "modifications" in section 15(3) and any meaning it might have appears to be subverted.

To be credible and effective the EIA process and legislation must provide mandatory guidelines for decision makers to ensure the environmental impacts are identified and addressed in a rational and effectively manner.

Further, the decision making process should be open and transparent. Transparency is required to ensure that environmental impacts of a project are acknowledged by the decision maker and are dealt with in a logical and effective fashion. If decision makers are relying on other departments, agencies or governments to deal with the environmental impacts of an activity there is a need to ensure that this reliance is well placed. This could be achieved by requiring the publication of reasons for decisions not to call for an environmental impact assessment. These reasons could then identify what non-EIA tools are being relied upon and why those tools will be effective.

In this way the purpose and intent of environmental legislation and environment impact assessments may be better fostered by our governments' decisions. Legislative reform is also required if EIAs are to retain any value as a tool for environmental protection and sustainable development.

[1] 2005 ABCA 283.
[2] R.S.A. 2000, c. E-12.
[3] S.C. 1992, c. 37.
[4] 2005 FC 1123 (F.C.T.D.).
[5] *Castle-Crown Wilderness Coalition v. Flett*, 2004 ABQB 515 [*Flett*]. For commentary on the case, see Cindy Chiasson, "Court Affirms Purpose of Alberta's EIA Process" *Environmental Law Centre News Brief* 19:3 (2004) 1.
[6] *Flett, ibid.* at paras. 85-88.
[7] *Ibid.*
[8] *Supra* note 1 at para. 45.
[9] *Ibid*. at para. 58.
[10] An environmental assessment was originally done in relation to the mining operation in 1996, when three *Fisheries Act* authorizations were required. This initial process went to a federal-provincial "joint review panel" which made recommendations in 1997. This was successfully challenged in court and the Joint Review Panel was reconvened to deal with issues regarding harlequin ducks.
[11] *Supra* note 4 at para. 9.
[12] *Supra* note 3.
[13] For further illustration of how the courts have broadly interpreted the government's discretion see *Friends of the West Country Association. v. Canada (Minister of Fisheries and Oceans) (C.A.)*, [2000] 2 F.C. 263 (F.C.A.) and *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2004 FC 1265.

Comments on this article may be sent to the editor at elc@elc.ab.ca.

Environmental Disasters and Lake Wabamun: A Review of the Government's Response

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Much media attention has been drawn to the oil spill that affected Lake Wabamun, west of Edmonton. On August 3, 2005, a freight train belonging to the Canadian National Railway Company (CN) derailed causing bunker C oil and a toxic pole-treating preservative to leak into Lake Wabamun. The province has used a number of strategies to deal with the spill, but it remains to be seen whether the response will satisfy Wabamun residents or lead to a better government response to future environmental disasters.

Regulatory tools

The cleanup of Lake Wabamun and the surrounding area has been regulated by an environmental protection order (EPO). On August 5, 2005, Alberta Environment issued an EPO directing that CN immediately take all necessary steps to clean up the spill and report daily on their progress to the department and the public. The EPO was amended on August 12 to more specifically detail the actions and deadlines required of CN. The amended EPO outlined specific timelines for both short and long term actions, including the submission of plans addressing water surface management, shoreline cleanup, monitoring, a communications strategy, and remediation. CN submitted its final plans, as required by the amended EPO, on October 28, 2005.

EPOs are the main tool used by Alberta Environment to ensure action is taken to address environmental problems. CN has met all the deadlines in the amended EPO, and Alberta Environment has not indicated that further orders will be issued against CN. Alberta Environment is limited in seeking costs for cleanup against CN unless CN fails to comply with the terms of the EPO.[1]

Prosecution

To date, no charges have been laid against CN. However, Alberta Environment and the Transportation Safety Board of Canada are currently conducting separate investigations into the incident.[2] Under the *Environmental Protection and Enhancement Act* (EPEA) it is an offence to release or permit the release into the environment of a substance that causes or may cause a significant adverse effect.[3] If prosecuted and convicted under EPEA, CN could be subject to a maximum fine of $500,000, which could be levied for each day on which the offence occurred or continued.[4] Creative sentencing orders could also be used to provide sentencing options beyond the traditional use of fines.[5]

If CN is prosecuted, it would be open for the company to raise a due diligence defense. This means that CN would not be convicted under EPEA if it established on a balance of probabilities that it took all reasonable steps to prevent the release.[6] If the option of prosecution is not pursued, the only fines that could be issued to CN would be an administrative penalty under EPEA. This amount is capped at $5,000.[7]

Environmental protection commission

While Alberta Environment issued an EPO to deal with the Wabamun cleanup, a vocal public was critical of a perceived delay on the part of the government to respond to the spill. Accordingly, Alberta's Environment Minister, Guy Boutilier, established an Environmental Protection Commission (the "Commission") to review and recommend changes to the Alberta government's ability to respond to environmental disasters. The creation of the Commission was the first of its kind in response to an environmental incident in Alberta. The Commission's final report and recommendations were released December 14, 2005.[8]

The Commission's work was aimed at improving the government's response to future disasters; its mandate was not directed at reviewing the Wabamun incident specifically. In its final report, the Commission made ten recommendations. Some of the key recommendations included creating a central government agency to deal with all disasters and a non-governmental institute to provide research support. It was also recommended that Alberta Environment create its own emergency response team within the department to provide advice and assistance in disaster situations.

Many of the Commission's recommendations were based on common sense. It is better to overreact to a disaster than under-react, and an effective response to disasters requires better training, communication and coordination amongst all parties involved. Unfortunately, the Commission's report fell short of strongly recommending or ensuring that those affected by an emergency receive immediate and on-going information. This was an issue for Wabamun residents who were not aware that hazardous pole treating preservative was spilled until five days after the derailment. The recommendations also did not specifically address the jurisdictional issues between the province and municipalities with respect to emergency response. Municipalities are often the first responders to emergencies and, in particular, smaller municipalities may not have the capacity to adequately respond in all situations. Further clarity from the Commission on how to coordinate and support municipalities during emergency response situations would have been useful.

Conclusion

The effectiveness of government's response to the Wabamun spill lies, in part, with the willingness to charge and prosecute CN. Alberta's environmental laws set out clear rules and obligations for the protection of the environment and ensuring compliance with these laws is an important part of Alberta Environment's obligations. Seeking a conviction against CN might provide some retribution for those residents affected by the Wabamun spill and general deterrence for others. A lack of response to violations of EPEA only fosters disrespect for the law and decreases the law's deterrent effect.

As noted, the Commission's role is proactive not reactive, and its recommendations will not offer any specific help to Wabamun residents affected by the August spill. The Commission's recommendations may result in improvements to Alberta's emergency response plans. Unfortunately, we will have to wait until the next environmental disaster occurs to put these improvements to the test.

[1] *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 245.

[2] Telephone conversation with Albert Poulette, Regional Compliance Manager, Alberta Environment (20 October 2005). As CN is currently under investigation, no information regarding any possible prosecution can be released.
[3] *Supra* note 1, ss. 109(2), 228(2).
[4] *Supra* note 1, ss. 228(2), 231.
[5] *Supra* note 1, s. 234. Creative sentences may include prohibitions against specified activities, remediation of the harm caused, publication of the facts of the offence, payment of security, provision of information to the Minister, compensation for remedial actions taken by the Minister, community service or any other conditions designed to secure the good conduct of the offender.
[6] *Supra* note 1, s. 229.
[7] *Supra* note 1, s. 237. *Administrative Penalty Regulation*, Alta. Reg. 23/2003.
[8] Alberta Environmental Protection Commission, *A Review of Alberta's Environmental and Emergency Response Capacity* (Edmonton: Alberta Environment, 2005), online: Alberta Environment <http://www3.gov.ab.ca/env/dept/epc/pubs/RecommendationReport.pdf>.

Comments on this article may be sent to the editor at elc@elc.ab.ca.

James Mallet says 'good-bye' to the ELC

By James Mallet
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The time has come for me to say good-bye to the Environmental Law Centre, after more than three rewarding years as Staff Counsel. I am moving on to join the law firm of McLennan Ross LLP, a long-time supporter of the Centre.

I will miss the work and my colleagues here. My thanks to the incredibly supportive and professional staff at the Centre. It has been a pleasure.

A special thanks to those individuals who call, e-mail, or drop by the Centre seeking assistance on environmental law issues. Working with you has been a challenge, an education, and an inspiration.

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In Progress

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Legislative Changes

Federal Regulations regarding new substances, pursuant to the *Canadian Environmental Protection Act, 1999,* are changed effective October 30, 2005. The former *New Substances Notification Regulations* have been repealed and replaced by the *New Substances Notification Regulations (Chemicals and Polymers)* and the *New Substances Notification Regulations (Organisms)*. As well, the *New Substances Fees Regulations* have been amended to ensure consistency with these new regulations. Environment Canada and Health Canada are preparing new Guidelines, but until these are finalized, the existing Guidelines are in effect to the extent they are consistent with the revised Regulations.

Alberta In September 2005, Alberta Environment released three Codes of Practice made under the *Environmental Protection and Enhancement Act* and the *Waste Control Regulation* pursuant to that Act. These are:

- the *Code of Practice for Energy Recovery*,
- the *Code of Practice for Small Incinerators*, and
- the *Code of Practice for Land Treatment of Soil Containing Hydrocarbons*.

As well, Alberta Environment released the *Code of Practice for Exploration Operations* made under the *Environmental Protection and Enhancement Act* and the *Conservation and Reclamation Regulation*. This revises a previous Code, which was scheduled for review every five years beginning in 2001. The Codes do not specify a review date, but indicate that they "will be reviewed as changes in technological [and/or] other standards warrant." The Codes do not specify the date on which they are in effect, although Alberta Environment's website indicates they are effective October 2005.

Alberta Environment also sought public input on two draft Codes of Practice. The draft codes are for sawmill operations and forage drying operations. Comments on the draft codes were requested by November 15, 2005.

Release of the Codes of Practice necessitated some amendments to regulations pursuant to the *Environmental Protection and Enhancement Act*. The *Activities Designation Regulation* (Alta. Reg. 276/2003), the *Substance Release Regulation* (Alta Reg. 124/93), the *Conservation and Reclamation Regulation* (Alta Reg. 115/93), the *Environmental Protection and Enhancement (Miscellaneous) Regulation* (Alta Reg. 118/93), the *Waste Control Regulation* (Alta Reg. 192/96), and the *Administrative Penalty Regulation* (Alta Reg. 23/2003) were all amended effective September 8, 2005.

Enforcement Actions

Enforcement Orders issued by Alberta Environment in 2005 pursuant to the *Water Act* include:

- Order No. WA-EO-2005/05-SR issued to Lorne and Sherry Henrickson of Okotoks over the construction of a gravel berm along the east bank of the Sheep River, excavation between the berm and the bank, and the beginnings of a concrete retaining wall. The Order requires all activities to cease and the removal of all concrete blocks in the river, on the bank, or on the gravel berm. The Order also requires submission and implementation of a Remedial Plan and submission of a Final Report.

- Order No. WA-EO-2005/04-NR to 995778 Alberta Ltd. and Simon Patrick Sochatsky as registered owner of land in Strathcona County and as owner/operator of Mac-Sie Sales & Rentals Ltd. The Order pertains to unauthorized grading activities on the land which resulted in the realignment of Gold Bar Creek, a wetland being partially or completely filled in, construction of a second new channel, and construction of an access road, all without the required approvals from Alberta Environment. As well, the watercourse crossings did not comply with the *Code of Practice for Watercourse Crossings*, nor had the notice requirements been met. The Order requires that all activities cease immediately and that remedial work be completed to restore the creek, tributary, and wetland to their pre-disturbance conditions, and the removal of the improperly constructed watercourse crossings. The Order includes written bi-weekly status reports and a final written report.

- Order No. WA-EO-2005/03-NR to Wolfgang Dittrich of the County of Grande Prairie. The Order pertains to an unauthorized obstruction placed in a water body which prevents the flow of water from adjacent lands and which alters the flow of water and is capable of causing an effect on the aquatic environment. The Order requires the immediate removal of the obstruction, that the flow of water be restored, that the removal be supervised by an Alberta Environment employee, and that the material removed from the obstruction remain upon the lands during all phases of removal. The Order has been appealed to the Alberta Environmental Appeals Board.

- Order No. WA-EO-2005/02-NR to Crystal Landing Corp. owners of lands near Grande Prairie where a wetland area is located, for allowing a third party to deposit soil from an adjacent housing development into the wetland, which could alter the level or flow of water and could cause an effect on the aquatic environment. The Order requires Crystal Landing to remove the soil deposited in the wetland, submit and implement a written plan, and submit a final written report upon completion of the remedial work.

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