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Centre Publishes Report on Brownfields

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A "brownfield" is a vacant or underused property where past actions have resulted in contamination, and there is a strong potential for the property to be redeveloped for other uses.[1] In Alberta, brownfields are often located within medium and larger sized urban centres, and include sites such as closed down service stations, wood preserving facilities and oil and gas facilities. The Environmental Law Centre recently completed a project on brownfields, which examined legal barriers and gaps that prevent brownfields from being redeveloped in Alberta. The project resulted in a law reform report entitled *Brownfield Redevelopment in Alberta: Analysis and Recommended Reforms.*[2] Funding and support for this project was provided by the Alberta Real Estate Foundation.

Brownfields generate considerable interest because of the many positive benefits that flow from their redevelopment, including increased tax revenue for government, increased productivity and market value of surrounding land, reduced urban sprawl, and revitalized urban cores. However, there are barriers that keep brownfields from being cleaned up and reused. The private sector is often reluctant to invest in brownfields due to concerns about liability, the lack of access to capital and financing, administrative burdens, and the negative public perception associated with these properties.

This report reviewed Alberta legislation in order to identify barriers and gaps which prevent brownfields from being redeveloped in the province. The report also examined selected case studies of brownfield redevelopment projects to demonstrate what has and has not worked in Alberta. In developing recommendations for reform, the report focused on strategies used in other jurisdictions, particularly Ontario, Quebec and British Columbia. Additional research for the report was derived from a stakeholder workshop where participants were asked to identify barriers to brownfield redevelopment in Alberta and consider some strategies to deal with the barriers identified.

Barriers and gaps

The project research led to the conclusion that there are barriers and gaps within Alberta's legislation that dampen the private sector's willingness to take on brownfield projects. Some of the major legal barriers and gaps identified include:[3]

- the scope of regulatory liability under the *Environmental Protection and Enhancement Act* (*EPEA*) is uncertain. In other words, the scope of who could be considered a "person responsible" for a substance release or contaminated site is uncertain;

- there is no process under *EPEA* to certify or "sign-off" on a site that has been cleaned up to recognized standards;

- alternative methods of cleanup, such as site-specific risk management, are not recognized in *EPEA*;
- regulatory liability for contamination is perpetual and cannot be terminated or transferred;
- there is no general assurance fund to deal with the cleanup of orphan sites or unfunded liabilities for all industries;
- there is no registry for environmental site information and no consistent system of notifying other parties if a site is risk managed or cleaned up;
- there is no formal linkage between the provincial regulation of contaminated land under *EPEA* and the municipal regulation over planning and development under the *Municipal Government Act* (*MGA*); and
- there are limits on the financial incentives which can be offered by municipalities to assist in redevelopment initiatives.

In addition to the legal barriers above, some non-legal barriers were identified including:[4]

- a lack of funding for brownfield initiatives, particularly from the federal and provincial levels of government;
- limited capacity to address contamination issues within smaller municipalities and some provincial government departments; and
- a negative public perception of brownfield properties.

Key recommendations

This report contains a broad range of interdependent recommendations aimed at addressing the barriers and gaps identified and, consequently, improving the chances that brownfields will be redeveloped in Alberta. The recommendations focus on "middle tier" brownfields, where the market value of the land once cleaned up may be slightly above or below the costs of cleanup. It is these sites that require strategic intervention in order to tip the scales in favour of redevelopment.

Some of the key law reform recommendations include:[5]

- clarifying the scope of persons responsible under *EPEA* and providing specific exemptions for parties such as municipalities, lenders, innocent purchasers and surface rights owners;
- including definitions for "remediation," "risk assessment" and "risk management" in *EPEA* and incorporating remediation (clean up) standards in a regulation;
- amending *EPEA* to include a process where a person responsible may apply to Alberta Environment for regulatory approval (or sign-off) of remediation efforts;

- amending *EPEA* to include a process for using site-specific risk management and formalizing the process for consulting with affected parties, such as regional health authorities and municipalities, when these measures are used;

- developing regulations under *EPEA* to provide for the termination of regulatory liability by enabling the use of remediation certificates;

- creating a general assurance fund to deal with orphan sites and unfunded liabilities; the fund would be resourced by a levy on wholesale hazardous substances, fines issued under *EPEA*, and fees for issuing remediation certificates;

- providing for notice on title when a remediation certificate has been issued and when site-specific risk management is used, and creating a searchable registry so environmental site information is more readily available to the public;

- creating a legislative requirement that the person applying to remediate a property must consult with the applicable municipality to determine the appropriate land use and requiring evidence of that consultation before providing regulatory approval (or sign-off) of remediation efforts;

- amending the *MGA* to allow municipalities to provide financial incentives to qualifying brownfield properties; and

- creating a provincial revolving loan fund to provide loans or low interest loans to private stakeholders and municipalities to undertake brownfield projects.

Some of the key recommendations aimed at addressing non-legal barriers include:[6]

- reinstating ongoing funding for the underground petroleum tank remediation program;

- creating the position of “brownfields coordinator” to be the one-window access point to the government for parties interested in brownfield redevelopment;

- offering training programs for municipal and provincial officials involved in brownfield redevelopment; and

- developing a government website or a pamphlet that outlines the challenges and benefits of brownfield redevelopment and highlights Alberta brownfield success stories.

This report concludes that these recommendations, taken as a whole, will facilitate the reuse of the many brownfield sites that currently remain idle and unproductive in Alberta.

Conclusion

As the pace of growth and development continues in this province, it is anticipated that the issue of brownfield redevelopment will become more prominent. As land pressures escalate, more intensive urban development will be forced to use older, developed areas rather than greenfields to accommodate growth. Additionally, some locales, such as upstream oil and gas sites, which were remote when first contaminated will become urbanized and need to be redeveloped. These trends point to the need for the province to have strategies in place to support the cleanup and reuse of brownfield sites. The recommendations included in this report are aimed at addressing this need by providing the government with tools to promote brownfield redevelopment in Alberta. The recommendations in the report should also be seen as part of a larger vision of creating sustainable communities within Alberta by helping to limit urban sprawl, preserve agricultural land, and restore contaminated lands back to productive use.

[1] See National Round Table on the Environment and the Economy, *Cleaning up the Past, Building the Future: A National Brownfield Redevelopment Strategy for Canada* (Ottawa: National Round Table on the Environment and the Economy, 2003) at A-3.
[2] Jodie Hierlmeier, *Brownfield Redevelopment in Alberta: Analysis and Recommended Reforms* (Edmonton: Environmental Law Centre (Alberta) Society, 2006).
[3] *Ibid.,* at 53-61.
[4] *Ibid.,* at 61-62.
[5] *Ibid.,* at 103-125.
[6] *Ibid.,* at 125-127.

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

The Centre's newest publication, Brownfield Redevelopment in Alberta: Analysis and Recommended Reforms, is now available for purchase (cost $15.00 + GST). To purchase the report, contact the Centre at 1-800-661-4238 or visit <www.elc.ab.ca/publications/Books.cfm>.

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Initial Public Consultation Begins on Alberta Land Use Framework

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Alberta's dynamic economy, fuelled largely by oil and gas development, has resulted in an increase in the number and type of land use conflicts. Cities are sprawling outwards as the influx of workers to meet Alberta labour needs translates into increased demands for urban residential development. Along the Calgary to Edmonton corridor, prime agricultural land has given way to residential development and the development of associated infrastructure. Meanwhile, forested land, which is only marginally appropriate for agriculture, is being cleared for agricultural purposes, at the expense of vital wildlife habitat. Elsewhere in the province, the development of oil and gas resources and the associated construction of roads, pipelines and other facilities fragment wilderness areas and native grasslands, to the detriment of wildlife, recreational users and ranchers. In addition, increased growth in all sectors has put increasing pressure on Alberta's water resources. Alberta has a fixed land base and limited resources; it has become clear that there is a need for management of the increasing and conflicting demands that are placed on the land by a variety of uses.

The Government of Alberta has begun public consultation respecting the development of a comprehensive Land Use Framework for the province. In a precursor to more extensive public consultations expected to take place in early 2007, the Canada West Foundation, a public policy research institute, has been contracted by the Alberta government to conduct a series of stakeholder focus groups throughout the province with the intention of identifying the desired attributes or characteristics for such a Land Use Framework. Also, the provincial department of Municipal Affairs, in conjunction with the Alberta Association of Municipal Districts and Counties and the Alberta Urban Municipalities Association, is inviting municipalities to identify representatives to participate in the creation of the Land Use Framework through attendance at sessions designed to allow municipalities to provide their input respecting the key challenges and issues facing land use in Alberta and the key characteristics and attributes the framework should embody to deal with these challenges.

Representatives from the Alberta Sustainable Resource and Environmental Management (SREM) cross-Ministry initiative expressed, at a Canada West Focus group meeting held in Edmonton, that further cross-stakeholder consultation would take place prior to the preparation of a draft Land Use Framework, upon which additional consultation would be based. Information about the proposed Land Use Framework and the expected timetable for future consultations will be posted on the SREM website: http://www.srem.gov.ab.ca/luf.html.

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

Flexible Federal Enforcement and Compliance Tool Would be of Value Provincially

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Environmental Protection Alternative Measures (EPAMs) are alternative compliance tools under the *Canadian Environmental Protection Act, 1999*[1] (*CEPA, 1999*) whereby environmental offenders can avoid prosecution and a criminal record. To date they have been used five times, with three being executed as a result of violations that occurred in Alberta. The Alberta EPAMs dealt with unlawfully offering for sale or selling pressurized containers with CFCs contrary to the *Ozone-depleting Substances Regulation,*[2] the unlawful export of dichlorodifluoromethane contrary to the *Ozone-depleting Substances Regulation,*[3] and the unlawful storage and deposition of PCB material contrary to section 272(1) of *CEPA, 1999*.[4]

While not applicable in all circumstances, EPAMs are good tools by which both the Crown and the accused can avoid the costs associated with trial while ensuring that proper punishment and reparations are made for environmental violations. EPAMs are broadly defined by *CEPA, 1999* as "measures, other than judicial proceedings, that are used to deal with a person who is alleged to have committed an offence under this Act."[5]

Prerequisites to an EPAM

EPAMs are not available to all accused nor are they applicable to all violations of *CEPA, 1999*. Some prerequisites to pursuing an EPAM include that:[6]

- There is a program for Environmental Protection Alternative Measures set up by the Attorney General in consultation with the Minister;
- The offence is "EPAM friendly", in so far as it falls within the enumerated offences for which EPAMs are allowed. Section 296 of *CEPA, 1999* lists offences where EPAMs cannot be used, including prohibitions against manufacturing or importing substances, knowingly providing misleading information, and violating an order or direction made under the Act;
- Its use is consistent with the purpose of the *CEPA, 1999*;
- An information has been laid in respect of the offence;
- The Attorney General is satisfied that the circumstances warrant an EPAM considering:
    - the protection of the environment and human life and health,
    - the person's history of compliance,
    - whether the offence is a repeat occurrence,
    - any allegation that information was being concealed or other attempts to subvert the purpose and requirements of *CEPA, 1999*, and
    - whether any remedial or preventative action has been taken;

- The person must accept responsibility for the act or omission that is the basis for the offence;
- The person applies in accordance with the regulations;
- The person has been advised of the right to be represented by counsel;
- There is sufficient evidence to proceed with a prosecution (in the opinion of the Attorney General); and
- The prosecution of the offence is not barred by law.

The agreement must be entered into within 180 days after the initial disclosure of Crown evidence.[7] Entering into an agreement is not possible where a person denies participation or involvement in the commission of the offence or where they would prefer that the matter be dealt with by the courts.[8]

Impacts of EPAMs on the process

The impacts of an EPAM are several and should be understood prior to entering into the agreement. *CEPA, 1999* provides protection against self-incrimination by prohibiting the admission of evidence in civil or criminal proceedings produced in the creation of the EPAM.[9] The use of an EPAM does not however result in a bar to a proceeding under the Act and does not prevent anyone from laying an information and pursuing a prosecution.[10]

Once an EPAM has been executed and compliance with the agreement is established a Court will dismiss the charges. Compliance with the agreement must be shown to the Court on a balance of probabilities.[11] EPAMs are also public documents that are filed with the Court and that appear in the CEPA Environmental Registry.[12]

Contravening an EPAM

Contravention of the agreement may be prosecuted as an indictable or summary conviction offence under section 272(1)(e) of *CEPA, 1999*. The potential penalty if a prosecution goes by indictment is a fine of up to $1 million and up to three years in prison, whereas summary conviction offences may attract a fine of up to $300,000 and up to 6 months in jail.

EPAMS as environmental protection tools

The primary purposes of EPAMs are to avoid a judicial proceeding, namely the prosecution or sentencing hearing, and to allow for the use of flexible mechanisms to deal with non-compliance with *CEPA, 1999* and its regulations. As a tool for environmental protection EPAMs have several benefits resulting from their flexibility. The EPAMs can (and past agreements have) included provisions for preparing training systems for employees; preparing monitoring and reporting programs; paying fines to organizations that promote environmental protection; and conducting education and marketing programs relating to the violation and the nature of the requirements under the Act. An additional benefit is the avoidance of a potentially costly and time-consuming trial, the outcome of which is always uncertain.

For the accused the benefits are numerous as well: avoiding the potential of bad public exposure through a trial; dealing with a violation in a cost effective manner, particularly in relation to minimizing legal costs; the ability to seek out flexible terms within the EPAM; and, depending on the nature of the EPAM, increased environmental due diligence within the company (and the future cost savings this entails).

Alberta's compliance tools

Justice Canada has used EPAMs in Alberta to effectively pursue federal compliance goals and such a system should be adopted provincially. The opportunity to enter into an EPAM style agreement should be made available under the provincial *Environmental Protection and Enhancement Act* (*EPEA*).[13] While a Court has broad flexibility under *EPEA* to order that specific actions take place these provisions only arise during sentencing. The benefits of conserving resources, avoiding uncertain trials, and pursuing wide ranging environmental protection goals are absent in the province so long as EPAMs remain a purely federal compliance tool.

EPAMs represent a proactive tool for ensuring that companies and individuals meet environmental standards without having to resort to an extensive and expensive judicial process. It has the added benefit of being legally enforceable and is therefore far more effective than other policy based compliance tools.

[1] S.C. 1999, c. C-33.
[2] *An agreement between A.G. Canada (of the First part) and Acklands-Granger Inc. (of the Second part)* dated November 15, 2005, online: Environment Canada, <http://www.ec.gc.ca/CEPARegistry/enforcement/acklands_agree.cfm>.
[3] *An agreement between A.G. Canada (of the First part) and Sherritt International Corporation (of the Second part)* dated September 28, 2001, online: Environment Canada, <http://www.ec.gc.ca/CEPARegistry/enforcement/sherritt_agree.cfm>.
[4] *An agreement between A.G. Canada and Johnson Controls Ltd.*, dated August 22, 2002, online: Environment Canada, <http://www.ec.gc.ca/CEPARegistry/enforcement/Johnson.cfm>.
[5] *Supra* note 1, s. 295.
[6] *Ibid*. at s. 296(1).
[7] *Ibid*. at subsection (h).
[8] *Ibid.* at s. 296(2).
[9] *Ibid.* at s. 296(3).
[10] *Ibid.* at s. 296(5) and 296(6).
[11] *Ibid.* at s. 296(4).
[12] The CEPA Environmental Registry can be accessed online: Environment Canada <http://www.ec.gc.ca/CEPARegistry/default.cfm>.
[13] R.S.A. 2000, c. E-12, as amended.

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

EUB Supports Watershed Management in Battle Lake

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The Alberta Energy and Utilities Board (EUB) is coordinating a pilot project to examine how to mitigate the effects of oil and gas development in the Battle Lake watershed. Work on the pilot project began earlier this year, and the project team's final recommendations are expected near the end of 2006.

Background

The pilot project is a result of a EUB decision involving the Battle Lake area.[1] In the decision, the EUB was asked to review a well license that it previously granted, and to consider additional applications for a battery and three pipelines in the area. In the review hearing, residents and community groups raised objections about the location of the well, which was drilled in a water recharge area for the Battle Lake watershed.[2] The Battle Lake watershed is the headwaters for the Battle River system. This watershed is considered unique because it is a prairie-fed system, as opposed to glacier-fed, which means its water supply comes entirely from surface run-off and groundwater flows.[3] It has been an ongoing challenge to maintain water quantity and quality in the watershed due to the nature of the watershed, its natural low flows, and the cumulative impact of municipal, industrial and agricultural activities. The County of Wetaskiwin had designated the area as a "watershed protection district" in order to minimize tree clearing and provide protection for the area.[4]

In the end, the EUB allowed the well to remain in the watershed, granted a license for the battery, and denied the application for the pipelines until a more suitable pipeline route could be found. However, in rendering its decision, the Board stated:[5]

> The Board recognizes that the concerns of the area residents are legitimate and is very aware that future energy projects could impact the Battle Lake Water Management Area, particularly if development is not planned and managed properly as the density of development continues to increase. As such, the Board is of the opinion that *additional measures must be taken* to ensure that future development continues to be conducted in an orderly, effective, and environmentally sensitive manner.

The "additional measures" resulted in the pilot project being established in order to devise an oil and gas development plan for the watershed.

The pilot project

The objectives of the pilot project are to protect the watershed from adverse and cumulative effects of oil and gas development, and to mitigate the potential adverse effects in the area.[6] To meet these objectives, the project will map the land use activities in the area, clarify the issues and priorities for the watershed, and make recommendations on issues such as:

- developing locally appropriate best practices for oil and gas development;

- identifying sensitive sites where best practices should be applied;
- establishing processes to ensure best practices are applied by all oil and gas companies in the area; and
- establishing approaches to monitor and review the implementation of the recommendations.

This work is being carried out by a project team consisting of representatives from the oil and gas industry, area residents, the Battle Lake Preservation Society, the County of Wetaskiwin, First Nations groups, the EUB, Alberta Environment, Alberta Sustainable Resource Development, and Environment Canada. The project team is expected to deliver its final findings and recommendations by November 2006. The findings will be forwarded to parties responsible for implementing the recommendations.

Comments

Unfortunately, the EUB did not impose a moratorium on new oil and gas development in the Battle Lake watershed, pending the recommendations of the project team to develop and enforce best practices in this area. This seems like a logical step that was missed by the EUB in formulating the project. A regional moratorium would only serve to encourage the project team to develop a workable strategy for oil and gas development in the watershed. It would also prevent any type of double standard from occurring for those companies working in the area before and after the recommendations are released.

On a positive note, the pilot project marks a change from the EUB's usual course of approving energy projects. For the most part, the EUB reviews and approves oil and gas projects on an individual basis, without much regard to regional planning or cumulative effects. Perhaps this pilot project signals the thin edge of the wedge with respect to incorporating regional planning and considering cumulative effects as necessary components of responsible oil and gas development in the province. It may also be an important step in engaging the EUB in broader land management and watershed management issues in Alberta.

[1] *Ketch Resources Ltd., Review of Well License No. 0313083 and Application for Associated Battery and Pipeline, Pembina Field* (1 December 2005) Decision 2005-129 (Alberta Energy and Utilities Board) Application No. 1407749.
[2] *Ibid.* at 4.
[3] See generally Battle River Watershed, online: <http://www.battleriverwatershed.ca/know_your_watershed/introduction#watershed>.
[4] *Supra* note 1 at 8. See also County of Wetaskiwin No. 10, By-law No. 95/54, *Land Use Bylaw* (no date) at 54, online: County of Wetaskiwin, Planning and Development Services <http://www.county.wetaskiwin.ab.ca/>.
[5] *Supra* note 1 at 9 [emphasis added].
[6] *Terms of Reference, Battle Lake Area Oil and Gas Development Plan*, online: Alberta Energy and Utilities Board <http://www.eub.ca/docs/new/project/BattleLakeTerms.pdf>.

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

EPEA Amendments Foreshadow New Regulatory Programs

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The Spring 2006 session of the Alberta Legislature brought forward a suite of amendments to the *Environmental Protection and Enhancement Act* (*EPEA*)[1] that came into force May 24, 2006. Much of the *Environmental Protection and Enhancement Amendment Act, 2006* (*Amendment Act*) focused on legislative changes affecting the regulation of contaminated sites, while also including provisions dealing with reclamation, emissions trading, and delegation of government powers under *EPEA*.[2]

Contaminated sites

The bulk of the *Amendment Act's* provisions were aimed at contaminated sites, and can be taken as the government's initial steps to implement parts of the recommendations made by the Contaminated Sites Stakeholder Advisory Committee for improving Alberta's contaminated sites system.[3] The most notable of these changes extended liability protection for municipalities in relation to contamination on land acquired by dedication or gift under Part 17 of the *Municipal Government Act*,[4] and clarified statutory obligations in relation to substance releases that occurred before *EPEA* came into force.[5]

While these provisions are welcome, the provisions for pre-*EPEA* releases have inherent weaknesses that will require further clarification. The *Amendment Act* created a new duty to report such releases, but did not create a corresponding offence and penalties for failing to comply with that duty, which differs from the reporting obligation for other releases. Section 113 of *EPEA* was amended to clearly enable the Director to issue an environmental protection order for a pre-*EPEA* release. However, it limits the Director to taking action only where adverse effect occurs, even if he or she is aware of the potential for such effect before it occurs, which is not consistent with other order powers under *EPEA*.

The *Amendment Act* also revised section 112 of *EPEA* dealing with the duty to take remedial measures following substance releases, by broadening the range of acceptable measures to include methods such as risk management. *EPEA* provisions related to remediation certificates have been broadened to provide further detail on applications for such certificates and to enable appeals of these certificates to the Environmental Appeals Board.[6] Alberta Environment has announced plans to begin issuing remediation certificates for petroleum storage tank sites in the fall of 2006, and for upstream oil and gas sites in April 2007.[7]

Other changes

Reclamation provisions were also modified by the *Amendment Act*. Changes included a broader definition of "operator" in relation to working interest participants in resource recovery schemes, and powers to enable regulations related to progressive reclamation.[8] Alberta Environment has indicated that progressive reclamation will apply to coal and oil sands mines, with details to come in planned amendments to the *Conservation and Reclamation Regulation*.[9]

Other amendments broadened the scope of persons to whom administration of *EPEA* and other duties may be transferred by the Minister or Director, from government employees to any person.[10] This significantly expands the range of persons who may bear regulatory responsibility, and may in part be intended to facilitate privatization of certain government functions, such as remediation review and certification. This is the case in British Columbia, where private sector contractors certify the bulk of remediated contaminated sites. The *Amendment Act* also expanded the scope of regulations that may be made concerning emissions trading,[11] and specifically validated the *Emissions Trading Regulation*,[12] which was created in the spring of 2006.

Conclusion

While many of the *Amendment Act's* changes appear positive at first blush, the actual impact will not be known until Alberta Environment begins to actively use the new provisions. In several instances, this will depend on further implementation steps by the Department, as will be the case in relation to remediation certificates and progressive reclamation. For the contaminated sites matters, the effects of these changes will not be known until Alberta Environment puts into place a fully updated regulatory system, as has been recommended by the Contaminated Sites Stakeholder Advisory Committee. The Environmental Law Centre's detailed comments on the *Amendment Act* can be accessed on its website at www.elc.ab.ca/briefs/index.cfm.[13]

[1] R.S.A. 2000, c. E-12.
[2] S.A. 2006, c. 15.
[3] The Contaminated Sites Stakeholder Advisory Committee was a multi-stakeholder committee charged with reviewing Alberta's regulatory system for contaminated sites and making recommendations to improve that system. The Committee made two reports to the Minister of Environment in 2004 and 2005. For further information regarding the Committee's work, see Cindy Chiasson, "Contaminated Sites Committee Submits Interim Report" *Environmental Law Centre News Brief* 19:2 (2004) 8, and Cindy Chiasson, "Alberta Environment Reviews Contaminated Sites Legislation" *Environmental Law Centre News Brief* 18:4 (2003) 8.
[4] *Supra* note 2, s. 2.
[5] *Ibid.*, ss. 11 – 13.
[6] *Ibid.*, ss. 10 and 14.
[7] See "Contaminated Sites Management Systems Project", online: Alberta Environment, Getting Involved – Initiatives <http://www.environment.gov.ab.ca/stakeholder/default.aspx>.
[8] *Supra* note 2, ss. 16 – 17.
[9] Letter from Guy Boutilier, Minister of Environment, to Cindy Chiasson, Executive Director, Environmental Law Centre (5 July 2006).
[10] *Supra* note 2, ss. 4 – 6.
[11] *Ibid.*, s. 8.
[12] Alta. Reg. 33/2006. For an overview of the Regulation, see Jodie Hierlmeier, "Emissions Trading Regulation Now in Force" *Environmental Law Centre News Brief* 21:2 (2006) 14.
[13] The Centre's brief refers to the *Amendment Act* by its Bill number, Bill 29.

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

Case Updates

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Fines for Illegal Export of Endangered Fish Upheld
R v. Luah, 2006 ABCA 217

In *R. v. Luah*, the Alberta Court of Appeal upheld a substantial fine under the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*[1] relating to the illegal trade of the endangered fish, Asian Arowana. The Court's decision also sent a message about the nature of fines and how they should be perceived by an accused.

The appeal revolved around the convicted party's ability to pay the $60,000 in fines ordered by the sentencing judge. The fines consisted of $7,500 per count on 4 counts and $30,000 for an estimated profit accruing from the illegal trade. The appellant argued that the fines were too high and that the amount of the fine was disproportionate to the ability of the accused to pay.

The Court noted that the sentencing judge arrived at the sentence partially based on the fact that the appellant had only "modest means", having heard from defence counsel that the appellant and wife were living paycheck to paycheck.[2] However, through the appeal process and a subsequent assessment of the appellant's finances by a Special Commissioner, it became apparent that the appellant's net worth was "about $256,000, of which $164,000 [were] investments".[3]

The Court cited both Registered Retirement Savings Plans and home equity as indicators of a significant ability to deal with the fines. In rejecting that the fines were too high, the Court noted that the maximum penalty for the violation was $150,000 per animal with the possibility of 5 years in prison.[4]

The Court then reviewed the time given to the appellant to pay the amount owing and concluded that it should be accelerated significantly. The sentencing judge had assessed an initial $10,000 payable immediately with $1000 monthly payments thereafter, to be completed by August 1, 2009.[5] The Court of Appeal, noting the benefits that accrued to the appellant due to a stay on the fine pending the appeal, ordered that $24,000 be paid within 10 days of the date of the Memorandum of Judgment, reflecting the amount that would have been paid had the appeal and stay not occurred. Further, the Court of Appeal shortened the payment of the remainder of the fine to one year, with $1000 per month being payable until July 1, 2007, when the remaining $25,000 would be due. By doing so the Court of Appeal sent a clear message that the appeal and stay were not viewed kindly in light of the equity available to the accused to pay the fine. The Court also sent the message that a fine is not a mere nuisance to be avoided or minimized by parties who violate Canadian environmental laws.

Finally, the Court indicated a need for the legislators to empower the Court of Appeal to send such a matter back to the sentencing judge to do a more thorough assessment of

financial circumstances. The Court felt that the expense in bringing the matter through the Court of Appeal and a Special Commissioner, and the need to fully inform these entities on issues the sentencing judge was well aware of, should be avoidable.

[1] S.C. 1992, c. 52.
[2] *Ibid.* at paragraph 15.
[3] *Ibid.* at paragraph 16.
[4] *Ibid*. at paragraph 14.
[5] *Ibid*. at paragraph 28.

Supreme Court Decision Confirms Federal Discretion in Environmental Assessment

***Prairie Acid Rain Coalition v. Minister of Fisheries and Oceans, 2006 FCA 31*, leave to appeal to S.C.C. refused.**

The Supreme Court of Canada has dismissed a leave to appeal application that aimed to challenge the breadth of the federal government's discretion when administering the *Canadian Environmental Assessment Act* (*CEAA*)[1]. The decision ended the legal recourse for several environmental non-government organizations that brought a judicial review application questioning the validity of the Department of Fisheries and Oceans (DFO) decision to scope the TrueNorth Oilsands project as a creek destruction project. The Federal Court of Canada and the Federal Court of Appeal both held that the discretion of a responsible authority to scope projects was broad under *CEAA* and that the scoping decision of DFO should not be overturned. The applicants (appellants) in the case sought a more purposive approach to *CEAA's* interpretation.

The efficacy of environmental assessments in light of recent judicial decisions was recently discussed in "Judicial Scrutiny of Environmental Assessments in Alberta: Deference is the Measure of the Day" *Environmental Law Centre News Brief*, 20:5 (2005), online: Environmental Law Centre, <http://www.elc.ab.ca/publications/NewsBriefDetails.cfm?ID=926>.

[1] S.C. 1992, c. 37, as amended.

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