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Court Finds Environment Minister's Failure to Identify Critical Habitat Unreasonable

***Alberta Wilderness Association v. Minister of Environment*, 2009 FC 710**

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In *Alberta Wilderness Association v. Minister of Environment*[1] the Federal Court held that the Minister of Environment acted unreasonably when deciding not to include more specific details regarding the identification of "critical habitat" of the Greater Sage-Grouse in the published recovery strategy under the federal *Species at Risk Act* (*SARA*)[2].

This case is of significance not only for Greater Sage-Grouse but also for other species, in that it clearly guides how the Minister must consider critical habitat designation. Section 41 of *SARA* indicates that critical habitat is to be identified "to the extent possible, based on the best available information". The government was of the view that the best available information was insufficient to identify critical habitat.[3] The Court, pointing to the Recovery Strategy itself, made the following important observation:[4]

> …the Recovery Strategy identifies four habitat requirements of the Greater Sage-Grouse: breeding habitat, nesting habitat, brood-rearing habitat and winter habitat. In so doing the respondent concluded that each habitat is essential to the Greater Sage-Grouse. In determining that no critical habitat could be identified, the respondent concluded that it could identify no critical breeding habitat, no critical nesting habitat, no critical brood-rearing habitat and no critical winter habitat. Had it been able to identity a party of or any one or more of these four habitat as critical, then it was required to identify that habitat pursuant to section 41(1)(c) of the *SARA*, as it is required to identify critical habitat "to the extent possible".

The Court then went on to consider the evidence before it regarding what was known about the Greater Sage-Grouse and these habitat types. The Recovery Strategy indicated, among other things, that no losses to active leks[5] was essential to the recovery of the species, identified some lek locations, and indicated that counts at active and inactive leks was an urgent priority.[6] As such the active leks are "necessary for the survival or recovery" of the species and fit squarely into the critical habitat definition set out in *SARA*.[7]

The government argued that "habitat" should not be confused with "critical habitat" and further that the Court should not become an "academy of science".[8] The government further argued that simply identifying Sage-Grouse leks was insufficient and that a host of questions exist about the extent of a lek that is "critical habitat". In response the Court noted that "the respondent appears to be seeking precision or exactitude in lek location whereas the *SARA* requires that it be based on the 'best available information' which may be less than precise and which may be less than exact".[9]

The court concluded:[10]

> In deciding that no critical habitat would be indentified in the Recovery Strategy, I find that the respondent reached that decision without regard to the material before it. It is not a decision that "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

The portion of the Recovery Strategy dealing with critical habitat was struck and redrafting was ordered in line with the Court's reasons.[11]

Discussion

The identification of critical habitat is of significance because once it is identified it garners further protection under *SARA*.[12] Specifically, destruction of "any part of the critical habitat" on federal protected areas is prohibited.[13] The critical habitat prohibitions in *SARA* for aquatic species and migratory birds, and species on non-protected federal land, only apply where there is an order by the Minister.[14] The Minister must make the order within 180 days of the recovery strategy or action plan being posted on the public registry where the critical habitat is not legally protected under existing Acts of Parliament or agreements under *SARA*. [15] In the event the critical habitat is legally protected, the Minister must indicate how this is the case in a statement posted on the public registry.[16]

The Court's decision indicates that the Minister must take the precautionary and preventative approach reflected in section 41 of *SARA*. Critical habitat must be identified to the "extent possible", i.e., uncertainty about certain aspects of the habitat should not be used to justify not listing it as critical. The Minister must use the best information available, but it need not be so thorough as to have complete knowledge of all aspects or all locations of critical habitat.

This is of significance as the approach proposed by the government, if it had been accepted, would have ensured significant delays in identification of critical habitat. If species recovery is to be a plausible outcome those aspects of critical habitat that are relevant to a listed species' life cycle must be protected.

[1] 2009 FC 710.
[2] S.C. 2002, c. 29.
[3] *Supra* note 1 at para 44.
[4] *Ibid., at para 54.*
[5] A lek is a mating arena wherein males engage in courtship displays.
[6] *Supra* note 1 at paras. 56 & 61.
[7] *Ibid*. at para 56. *SARA* defines critical habitat as habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species.
[8] *Ibid* at paras. 48-49
[8] *Ibid*. at para. 60.
[10] *Ibid*. at para. 64. The court further found that habitat identified as source habitat was not included when in the definition of critical habitat.
[11] *Ibid*. at para. 72.
[12] *Supra* note 2 at s. 58.
[13] *Ibid* at s. 58(2).
[14] *Ibid*. at s. 58(4)
[15] *Ibid*. at s. 58(5). Section 58(5.1) further limits the critical habitat provisions relating to migratory birds to habitat to which the *Migratory Birds Convention Act, 1994* (*MBCA*) applies. The *MBCA* relates primarily to the birds themselves and bird nests and therefore the critical habitat prohibitions would likely be similarly limited. One may argue that the Act also applies to waters frequented by migratory birds. Also, Article II of the convention itself states that the conservation of migratory birds will be managed in accord with conservation principles, including protecting "habitat necessary of the conservation of migratory birds".

[16] *Ibid*. at s. 58(5). Section 58(5.1) further limits the critical habitat provisions relating to migratory birds to habitat to which the *Migratory Birds Convention Act, 1994* (*MBCA*) applies. The *MBCA* relates primarily to the birds themselves and bird nests and therefore the critical habitat prohibitions would likely be similarly limited. One may argue that the Act also applies to waters frequented by migratory birds. Also, Article II of the convention itself states that the conservation of migratory birds will be managed in accord with conservation principles, including protecting "habitat necessary of the conservation of migratory birds".

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Federal Environmental Laws Get Enforcement And Penalty Makeover

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A much-needed update to federal environmental laws took place earlier this year with the passage of Bill C-16, which amends nine other environmentally related statutes.[1] The bulk of the amendments revolve around penalties and enforcement provisions. The Acts that are amended include:

- the *Antarctic Environmental Protection Act*;
- the *Canada National Marine Conservation Areas Act*;
- the *Canada National Parks Act*;
- the *Canada Wildlife Act;*
- the *Canadian Environmental Protection Act, 1999*;
- the *International River Improvements Act*;
- the *Migratory Birds Convention Act, 1994*;
- the *Saguenay-St. Lawrence Marine Park Act*; and
- the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*.

Most notably the legislation includes significant maximum penalties for various offences and the introduction of minimum penalties. Penalties differ for "individuals", "small revenue corporations", and "other persons".

The amended penalties are significant and should allow the Crown to argue for significantly higher fines. The amendments will also send the message to the Courts that penalties for environmental convictions should be increased.

To illustrate the change, if convicted of depositing substances harmful to migratory birds in waters frequented by them, one may face a maximum $1 million penalty or imprisonment of

not more than three years (if the Crown proceeds by indictment) or a maximum of $300, 000 or not more than six months in prison (if the Crown proceeds by summary conviction).[2] The new fines for the same offence are set out below.

	Minimum	Maximum	Min. 2nd offence	Max. 2nd offence	Prison terms
Individual					
Indictment	$15,000	$1 Million	$30,000	$2 Million	No more than three years
Summary Conviction	$5,000	$300,000	$10,000	$600,000	No more than six months
Other persons – includes corporations that are not "small revenue corporations"					
Indictment	$500,000	$6 Million	$1 Million	$12 Million	
Summary Conviction	$100,000	$4 Million	$200,000	$8 Million	
Small revenue corporation					
Indictment	$75,000	$4 Million	$150,000	$8 Million	
Summary Conviction	$25,000	$2 Million	$50,000	$4 Million	

The fine amounts are similar for violations of other prescribed sections of the other environmental statutes amended by the Bill.

The court may designate a corporation as a "small revenue corporation" where it is satisfied that the corporation's gross revenue in the year preceding from the date of the alleged offence was not more than $5,000,000.[3]

A court may order a penalty lower than a minimum where it is satisfied that there would be "undue financial hardship", but the court must provide reasons for its decision.[4]

Another interesting feature of the Bill is the requirement that, in instances where corporations with shareholders are convicted, the court must order the corporation to notify its shareholders of the conviction, the punishment and the facts relating the commission of the offence.[5]

Also of significance is that summary convictions are made possible for five years, where previously they were usually limited to a two-year period.[6] Administrative penalties enabled and appeal mechanisms to deal with compliance orders and fines are enabled by the creation of the *Environmental Violations Administrative Monetary Penalties Act.*[7]

Discussion

In terms of sentencing goals, these amendments are to be lauded. Promoting due diligence and providing a deterrent to violating environmental laws requires fines that are significant enough to warrant shareholder concern, if not impact on shareholder value.

Impacting corporate governance should remain top of mind where a court hears arguments regarding the "undue financial hardship" of these penalties. If financial hardship of owners and investors is completely avoided one must question whether the sentencing goals of deterrence have been met.

The next step to be taken is to remove the ability to claim environmental fines as expenses for tax purposes. The tax-deductible nature of fines must change if our society wants to move to truly reflecting the criminal nature of environmental offences.

[1] *An Act to amend certain Acts that relate to the environment and to enact provisions respecting the enforcement of certain Acts that relate to the Environment,* S.C. 2009, c. 14, assented to June 18, 2009.
[2] S.C. 1994, c. 22 at section 13(1.1).
[3] *Supra* note 1, ss. 12, 25, 37, 48, 72, 93, 102, 114 and 122.
[4] *Ibid*.
[5] *Ibid*.
[6] *Ibid.,* ss. 14, 28, 40, 51, 72, 93, 105, 114 and 122.
[7] *Ibid*., s. 126.

New Legislation Continues Changes to Alberta's Land Use Planning System

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The Alberta government has moved closer to implementation of its new land use planning and management system in passing the *Alberta Land Stewardship Act* (*ALSA*) during the spring 2009 legislative session.[1] The Land Use Framework, which has been under development since 2006, seeks to manage Alberta's lands on a regional basis to address the cumulative effects of activities. *ALSA* provides the legislative structure and authority to anchor this initiative, but many of the details remain to be developed through regulation.

The *Land-use Framework* document, released in late 2008, envisions a system of regional land use plans for each of seven new land use regions to be established by the province.[2] These land use plans will set out regional objectives, integrate provincial policies and bind decision-makers, such as municipalities and regulatory tribunals. A new governance structure will include a Land Use Secretariat to oversee implementation of the framework and Regional Advisory Councils for each land use region to provide multi-stakeholder input into the regional plans. Ultimate authority is to rest with the provincial Cabinet. Cumulative effects management, more efficient land use, a suite of conservation and stewardship tools, establishment of an information, monitoring and knowledge system, and inclusion of First Nations in land use planning are other planned attributes of the new framework.

About *ALSA*

In essence, *ALSA* creates the legal skeleton for the Land Use Framework. It enables the provincial Cabinet to make regulations establishing the governance bodies mentioned above and setting out the process for development of land use plans.[3] The broad scope of discretion given to the Cabinet in *ALSA* is one of its most striking attributes. Cabinet controls all aspects of the new land use planning system, from the creation of land use regions, to the content, approval and amendment of regional land use plans, and the process for developing these plans, including whether there will be any public involvement.

Another noteworthy aspect of *ALSA* is the clear priority given to the new planning system. The Act takes precedence over all other provincial legislation and the regional plans, when developed, will have the power of regulations and prevail over all other provincial regulations.[4]

The regional plans will bind the provincial government, agencies such as the Energy Resources Conservation Board and Alberta Utilities Commission, and municipalities.[5] Twenty-seven existing provincial Acts, including the *Municipal Government Act, Public Lands Act* and *Forests Act*, have been amended to ensure consistency with *ALSA*.[6] Many of these consequential amendments modify legislation to require that future decisions affecting land use are consistent with regional plans.

The Act provides for a range of conservation and stewardship tools that can be used by both government and the private sector on Alberta lands. The provisions dealing with conservation easements were moved from the *Environmental Protection and Enhancement Act* to *ALSA* and expanded to allow for protection of agricultural land.[7] New tools include conservation directives, which can be declared in regional plans to protect lands, and market-based options, including stewardship units, conservation offsets and transfer of development credit schemes.[8] The details of these new tools remain to be developed in regulations under *ALSA*.

ALSA relies mainly on existing appeal processes, and creates new appeal processes under the *Forests Act* and *Public Lands Act*.[9] While the advantage of this approach is that it does not create new bureaucratic structures, its inherent weakness is the variety of appeal processes available under Alberta laws affecting land use. This means that land use decisions will not be subject to one consistent appeal process and that persons appealing, relevant rules and availability of costs will vary depending on the subject matter of the decision being appealed and the applicable legislation.

There is no appeal process for a decision that does not comply with a land use plan and *ALSA* prevents any type of judicial review or other court intervention initiated by the public or other interests. Complaints of non-compliance may be made to the Stewardship Commissioner, a government official. *ALSA* gives the Commissioner authority to investigate complaints and then refer issues of non-compliance to the relevant Minister, government department or municipality. If the Commissioner feels that no other remedy is available, he or she may also apply to the courts for an order to deal with the non-compliance.

How does *ALSA* measure up?

The Environmental Law Centre has followed and provided commentary on the Land Use Framework initiative from its beginning in 2006, with particular attention to legislative developments. In a previous *News Brief* article, we set out the Centre's vision for land use in Alberta: "Land use decisions are made in accordance with sound laws and policies that are protective of the environment and are implemented and effectively applied so to ensure the sustainability of Alberta's natural capital."[10] One of the three necessary elements of that vision was a dedicated piece of legislation to deal with land use planning processes. More specifically, we suggested that such legislation should include the following aspects:

- It should be a single, binding Act, with corresponding amendments to existing provincial legislation.
- It should be administered by Cabinet and an administrative secretariat, separate from individual provincial government departments.
- All government departments should be required to conform to regional plans when making land use decisions.
- It should set out decision-making process for land use planning. This should cover identification of provincial and regional priorities and related thresholds and limits;

create planning regions and regional planning bodies; establish a process for developing regional plans; and provide for enforcement of regional plans in relation to local decisions.

- It should assign planning responsibilities, create a clear decision-making hierarchy and require local land use decisions to conform to regional plans.

In large part, *ALSA* meets the basic elements envisioned by the Centre. Where more could have been done, and ideally will be done, is in relation to the decision-making process for land use planning. While the essentials of the process, as described in the *Land-use Framework* document, are provided for in *ALSA*, they are for the most part within Cabinet's discretion to create and implement. The establishment of the Regional Advisory Councils, creation of the planning process itself, development and amendment of regional plans, and content of those plans, are all either discretionary acts that can be taken by Cabinet or determined by regulations that may be made by Cabinet.[11] As such, the ultimate import of the new land use planning and management system is yet to be seen.

Future steps

While supporting regulations are yet to be enacted, work has begun on development of regional plans for two land use regions. The *Land-use Framework* document identified as priority areas the Lower Athabasca region (Fort McMurray oil sands area) and the South Saskatchewan region (the southern-most area of Alberta, to and including Calgary).[12] Regional advisory councils have been appointed for both regions, and public consultation on the planning process has begun in the Lower Athabasca region. The provincial government expects land use plans for these regions to be completed and approved by the end of 2010. Development of plans for the North Saskatchewan region (covering that river basin and including Edmonton) and another region yet to be determined will begin in 2010, with scheduled completion for the end of 2011. The remaining three land use regions will then undergo plan development, to be completed by the end of 2012.

ALSA's enactment should in no way be seen as an endpoint in the development and implementation of Alberta's new land use planning and management system. The practical effects of this system will unfold in the coming years as a full regulatory package is put in place by the province and regional plans are developed. Steps taken over the next year in the Lower Athabasca and South Saskatchewan regions may be one of the best indicators of how this system will proceed.

[1] S.A. 2009, c. 26.8 (awaiting proclamation).
[2] (Government of Alberta: Edmonton, 2008).
[3] *Supra* note 1, Part 4. Section 50 deals with enabling powers for regulations related to the planning process and roles of various bodies.
[4] *Ibid*., s. 13 (legal nature of regional plans) and s. 17 (precedence of *ALSA* and regional plans).
[5] *Ibid*., s. 15.
[6] *Ibid*., ss. 68-94.
[7] *Ibid*., ss. 27-34.
[8] *Ibid*., ss. 35-49.
[9] *Ibid*., ss. 76(37) and 90(50).
[10] Dean Watt and Jodie Hierlmeier, "The Environmental Law Centre's Vision for Land Use Planning in Alberta" *Environmental Law Centre News Brief* 23:2 (2008) 1, online: Environmental Law Centre <http://www.elc.ab.ca/Content_Files/Files/NewsBriefs/Vol.23No.2.pdf>.
[11] *Supra* note 1. See ss. 3-6 re: creation of land use planning regions and regional land use plans; ss. 7-12 re: content of regional plans; and ss. 51-55 re: the planning process and Regional Advisory Councils. Section 5 empowers Cabinet to make and amend regional plans without the creation of or input from Regional Advisory Councils.
[12] *Supra* note 2, pp. 43-45.

The Decision in *Great Lakes United v. Canada (Minister of Environment)*: The Federal Government's Responsibility to Report on Pollution from the Mining Sector, and Beyond?

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Introduction

The recent decision by the Federal Court in *Great Lakes United v. Canada*[1] affirms that the Minister of the Environment has a duty to inform Canadians about the state of the environment. Specifically, the Minister must collect previously withheld pollution data from mining operations and publish this information on the National Pollutant Release Inventory (NPRI).[2]

The NPRI is a publicly accessible database of pollution release information collected from facilities in the industrial, commercial and institutional sectors. The legislative authority for the NPRI is granted by the *Canadian Environmental Protection Act, 1999*[3] (*CEPA*), which requires the Minister to create a national inventory of pollutant releases and allows him or her to collect and publish data for this purpose.

Prior to the Court's ruling, the mining sector was not required to report releases of NPRI pollutants in tailings and waste rock, so long as these wastes remained onsite. This exemption was unique to the mining sector as other similar industrial operations have always been required to report onsite releases.

The Court found that the Minister erred in failing to collect and publish pollution data from the mining sector. According to the Court, the *CEPA* imposes a duty on the Minister to ensure Canadians have access to information on pollution releases that may affect their environment and health. Further, this information must be contained in a single national inventory – the NPRI.

Background

In general terms, the NPRI reporting framework requires facilities beyond a certain size, or carrying on specified activities, to report any releases of specified pollutants in excess of prescribed thresholds. A range of industrial chemicals, heavy metals, air pollutants and volatile organic compounds are listed as pollutants under the NPRI. The listed pollutants include, but are not limited to, those substances identified as toxic under the *CEPA* (with the exception of some greenhouse gases). Annually, the Minister sets detailed reporting criteria in a notice published in the *Canada Gazette.*

Until 2005, extractive mining operations were explicitly exempt from reporting pollution releases from the disposal of tailings, waste ore, and rock overburden to onsite ponds and storage areas. In the absence of a specific exemption for the mining sector, these disposals would have met the NPRI reporting criteria, as the mine wastes contain a number of listed substances including metals like aluminum, cadmium, arsenic and selenium.

In 2006, the mining exemption was virtually eliminated from the NPRI notice and accompanying guidelines.[4] Despite eliminating the formal exemption, the Minister did not collect or publish data regarding onsite releases or transfers of pollutants from waste rock and tailings in 2006 or 2007.

Great Lakes United and MiningWatch Canada, represented by Ecojustice, applied for judicial review of the Minister's decision not to collect this data. The applicants sought an order directing the Minister to publish the information detailing releases of NPRI substances to onsite tailings and waste rock disposal areas for 2006 and subsequent years.

Analysis

The Court considered whether the Minister had discretion not to collect information regarding pollution from mine wastes, effectively creating a sector-specific exemption for NPRI reporting. The Minister argued that the permissive language of s. 46 of the *CEPA* grants discretionary authority to choose which information is collected for the purposes of publishing the NPRI. The Court rejected this interpretation, finding it inconsistent with the legislative scheme of the statute when read as a whole. In particular, the obligations imposed on government by sections 2, 48, and 50 would be undermined if the Minister had unfettered discretion over the data collected for the NPRI. Section 2 obliges the Minister to, among other things, provide Canadians with information on the state of the environment, to protect the environment and human health from the release of toxic substances, and to apply and enforce the *CEPA* in a fair and consistent manner. Read together, sections 48 and 50 require that the Minister publish a national inventory of pollution releases using information collected under s. 46, and any additional information to which the Minister has access.

After considering these provisions, the Court determined that the discretion in s. 46 is given to enable the Minister to meet his obligations under the *CEPA*, namely, to inform Canadians and to protect the environment. Therefore, the Minister cannot simply refuse to collect and publish data if it is needed to ensure "that the people of Canada have a full and accurate picture of the releases of those pollutants that pose environmental and health risks."[5]

The Court was unequivocal in finding that the Minister's duties to collect and publish pollution release information on the NPRI extended to onsite releases, deposits and transfers of listed substances to tailings ponds and waste rock disposal areas. Under a plain and ordinary reading of the statute, it was clear to the Court that those activities were releases of pollutants for the purposes of the *CEPA*. This interpretation was strongly supported by the fact that the Minister and industry representatives had already agreed, during a prolonged negotiation process, that tailings and waste rock data should be published.[6] Further, exempting mining operations from reporting onsite releases when other sectors must provide this information is not in keeping with the Minister's obligation to apply the *CEPA* in a fair and consistent way.[7]

Accordingly, the Court found that the Minister was incorrect in his interpretation that the *CEPA* did not require collecting and reporting onsite mine tailing and waste rock releases in the NPRI. The Minister was ordered to publish this information on the national inventory for 2006 and subsequent years. The precedent set by the Federal Court will stand, as Environment Canada decided not to appeal the decision.

Conclusion

This ruling is a large step towards greater transparency in environmental reporting. The Court's decision requires the Minister to publish information about a significant source of pollution in Canada. Not only has this case improved reporting requirements for metal mines, the initial target of the litigation, recently Alberta Environment indicated that the Federal Court ruling equally applies to oilsands tailings ponds, meaning that oilsands operations will now have to report onsite releases in accordance with NPRI requirements.[8] Furthermore, the strong wording of the judgment opens the door to arguments that the Federal Government has an obligation to provide greater disclosure and more accurate reporting on the state of the environment.

The Court was patently clear that the Minister's discretion to collect data for the purposes of publishing the NPRI must be exercised in accordance with his or her duties under the *CEPA*. Consequently, the Minister cannot allow a sector to withhold information that "is needed to allow Canadians to know what environment and health risks they are confronting"[9]. This finding suggests that even if the mining exemption had never been formally removed from the reporting criteria, the Minister would still have a duty to collect information from that sector. It also follows that the Minister cannot reintroduce the mining exemption, nor create a similar exemption for other sectors, when the *CEPA* otherwise requires the information be included on the NPRI.

While this judgment firmly establishes that the Minister cannot exempt whole sectors from reporting pollution that meets NPRI criteria, the question remains whether the criteria themselves can be successfully challenged for not providing Canadians with a "full and accurate picture" of the pollution that threatens the environment or their health. This question may be of serious interest to those members of the environmental community who have criticized the efficacy NPRI framework.

From the environmental perspective the current NPRI reporting system has a number of shortcomings. For example, the pollution data collected for the NPRI is not based on any direct measurement of releases, but instead is generated by estimation. [10] The accuracy of this method has been questioned, especially in light of the large discrepancies between the data reported by industry and Environment Canada's own estimates. [11] Also, under the current regulations significant sources of pollution are not recorded. Many smaller facilities are not captured by the NPRI because they do not exceed prescribed size-thresholds.[12] Even within facilities that meet reporting thresholds, not all polluting activities must be monitored.[13]

The *Great Lakes United* case provides limited guidance on whether existing NPRI thresholds and methodologies could be successfully challenged. The Minister's duties to report on the state of the environment under the *CEPA* are construed broadly in the wording of the judgment, but must be examined in the context of the circumstances of the case. Undoubtedly a number of factors influenced the Court's decision that the Minister must require mines to report onsite depositions of pollutants in tailings and waste rock. First, these depositions fall squarely within the meaning of pollution releases under the *CEPA.* Secondly, other sectors are required report similar data. Thirdly, the Minster either already had this information, or the information was readily accessible. Fourthly, after 2005 mining operations were no longer formally exempt from the NPRI reporting criteria. Fifthly, there was general consensus among stakeholders that onsite release data should be made publicly available. Finally, although the Court did not indicate that the sheer volume and visibility of mine waste was a relevant consideration, it is hard to imagine they did not effect the decision. Given the whole of these circumstances it is untreatable that the Court found it necessary that pollution data from mine wastes be included in NPRI.

It may be less apparent to a court that existing NPRI methodologies and thresholds are insufficient to meet the Minister's state of the environment reporting obligations under the *CEPA.* Making this case would require technical arguments about pollution monitoring practices and evidence that the excluded sources of pollution pose a risk to health or the environment adequate to warrant reporting on the NPRI. A court may be reluctant to accept such arguments, instead deferring to the expertise of the Minister. Also, because of practical considerations, not all pollution information can or should be included in the NPRI. As the Court recognized: "in certain instances, there could be a dispute as to whether information is significant enough or appropriate for inclusion in a national inventory"[14].

The full extent of the Minister's duty to inform Canadians about the state of the environment will not be known without further litigation; however, the *Great Lakes United* case provides the foundation on which a more comprehensive NPRI can be built.

[1] 2009 FC 408; 2009 CarswellNat 927.
[2] The NPRI is publicly accessible online at http://www.ec.gc.ca/inrp-npri/default.asp?lang=En&n=4A577BB9-1
[3] S.C. 1999, c. 33, s. 46, 48.
[4] According to the 2006 NPRI notice published in the *Canada Gazette* and the accompanying Ministry reporting guide the mining exemption was removed, except for mining related to pits and quarries. (*Notice with respect to the substances in the National Pollutant Release Inventory for 2006, C Gaz. 2006 I. 365).*After the Federal Court delivered its judgment in the case, the 2008 NPRI notice further narrowed the mining exception as now, in accordance with Schedule I section 2(1)(h), pits and quarries with an annual production of 500,000 tonnes per year or more must report. (*Notice with respect to the substances in the National Pollutant Release Inventory for 2008.* C. Gaz. 2008 I. 340).
[5] *Supra* note 1 at para. 201.
[6] For over 16 years the federal government negotiated with stakeholders on how to report pollution from mine wastes; no consensus was reached in this time. The contentious issue in recent negotiations was not whether the tailings and waste rock data should be published, but whether the NPRI was the appropriate forum for its publication. Industry and some elements in the federal government felt that a separate inventory should be created exclusively for the purposes of reporting onsite transfers of mine wastes. See *ibid* para. 166 – 170.
[7] *Ibid* para. 224-225.
[8] Hanneke Brooymans "Court orders oilsands to list contents of tailings. Ecojustice lawyers convince judge to overrule environment minister" *Edmonton Journal* (28 May 2009), online: http://www.edmontonjournal.com/Business/Court+orders+oilsands+list+contents+tailings/1638171/story.html.
[9] *Supra* note 1 at para. 202.
[10] Anna Tilman, "National Pollutant Release Inventory (NPRI) – Critical Air Contaminants (CACs)" ENGO Report (2006). Available online at http://cen-rce.org/eng/consultations/delegate_calls/NPRI%20ENGO%20Paper%20CACs%2007.pdf.
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid* at para. 205.

Private Claims Vs. Public Interest and Environmental Protections
Genesis Land Development Corp. v. Alberta, 2009 AQBQ 221

By Jason Unger
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Development of additional facilities in provincial and national parks will always be contentious. Kananaskis Country is no different and was the subject of a recent decision regarding a motion in *Genesis Land Development Corp. v. Alberta* to strike out claims brought by the Minister of Environment (Hon. Gary Mar) and Alberta.[1] The case involved a land development company seeking to create a recreation business as part of Spray Lakes Reservoir dating back to 1987. A lease and licence of occupation for 25 years were issued in 1994 and subsequent security deposits were paid in relation to a "boat operation".[2] Various other stages of development were approved in principle by government but a variety of approvals and authorizations were required that were yet to be obtained. Following the introduction of a new policy in 1999 for Kananaskis Country, where new development was to be limited, and consideration was to be given to existing proposals.[3]

In late 1999, the Minister informed the developer that an environmental impact assessment report would be required and that approval must be obtained from the Natural Resources Conservation Board.[4] The terms of reference were completed and published in early 2000. At

that time the Minister received significant public opposition to the project, subsequently came to the opinion that the projects were not in the public interest and issued two orders relating to limiting approval or registration under the *Environmental Protection and Enhancement Act (EPEA)* and *Water Act*. The plaintiff in the case claimed for damages as a result of abuse of office, tortuous interference with business relations, expropriation, and breach of contract. The applicants (Minister and Crown) sought to strike the statement of claim or have summary judgment on the claims granted in relation to the actions. All the developer's claims were dismissed except that relating to the boat lease and licences and whether claims for expropriation, breach of contract and duty of good faith and fair dealing remained.[5]

In coming to this conclusion, the Court noted that an assurance of approval (which was accepted by the Crown for the purpose of the application) did not equate with the formation of a contract and that the "Applicants could not contract out their statutory duty to determine if the projects were in the public interest".[6]

In dealing with the issue of abuse of office and tortious interference, the Court failed to find any evidence of the requisite intent and unlawful action on behalf the Minister or the Crown. The developer had argued that the Minister's actions were unlawful by forming the opinion that the projects were not in the public interest and that the orders were signed for ulterior motives.[7] The Court went on to note that considerations given by the Minister in this case fell within the scope of the purpose of the *Environmental Protection and Enhancement Act*.[8] The Court noted that "the legislation does not specify how the particular criteria are to be weighed by the Minister in making an informed decision that would permit him to exercise his power under s.62 of the *EPEA*. However, at a minimum, the factors considered by Mar clearly indicated a general concern for the "protection, enhancement and wise use of the environment".[9]

On the issue of whether expropriation occurred by way of the Ministerial Order the Court looked to determine whether an interest in land was created. The Court found none except for the boat operation lease and licence, for which a genuine issue for trial was found. In this regard the Court noted in obiter that further authorizations were needed for the boat operation and that, depending on the nature of these authorization requirements a compensable interest may have arisen. Namely, where an authorization was merely a condition of the operation an interest may have vested in the operator but where the authorization was a true condition precedent to the activity proceeding a compensable interest would not be recognized. In most instances authorizations would be of the nature of a condition precedent to any vesting of any interest in land.

Discussion

One may postulate that the likely success of the plaintiff's arguments were remote, yet where development is curtailed in Alberta it seems there will often be an expectation of compensation notwithstanding the legislative discretion in place for the decision maker. This in itself likely causes some hesitation for decision-makers when they consider denying an approval or licence where a discretionary determination about the public interest or environmental impact is involved. One may argue that this discretion is even more hesitatingly applied by municipalities who may view the risks of making regulatory decisions that impact financial gains of an individual or company as too great.[10]

The discretion offered the Minister by *EPEA* is very broad and encompassing and yet it is still challenged. When faced with such damage claims is it any wonder that discretion to halt development is exercised so sparingly? The *Genesis* case does not offer sweeping reforms that will allay the concerns of decision-makers, but should come as some comfort to public officials and appointees.

[1] 2009 ABQB 221, online: Alberta Courts <http://www.albertacourts.ab.ca/jdb/2003-/qb/civil/2009/2009abqb0221.pdf>.
[2] *Ibid*. at para. 10.
[3] *Ibid*. at para. 16.
[4] *Ibid*. at para. 19.
[5] *Ibid*. at paras. 177-179.
[6] *Ibid*. at para. 170.
[7] *Ibid*. at para. 78.
[8] *Ibid*. at para. 98.
[9] *Ibid.* at para. 100.
[10] For example, see *Elite Swine Inc. v. Moosomin (Rural Municipalties No. 121)* 2006 SKQB 314, online: CanLII <http://www.canlii.org/eliisa/highlight.do?language=en&searchTitle=S.S.+2005%2C+c.+S-35.03&origin=%2Fen%2Fsk%2Flaws%2Fstat%2Fss-2005-c-s-35.03%2Flatest%2Fss-2005-c-s-35.03.html&path=/en/sk/skqb/doc/2006/2006skqb314/2006skqb314.html>.

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