ENVIRONMENTAL LAW CENTRE

NEWS BRIEF

IN THIS ISSUE

LOOKING BACK AND GOING FORWARD

By The Honourable Brian O'Ferrall
Justice of the Court of Appeal of Alberta

I was asked to write a "retrospective" on how environmental decision-making has changed over the years. Having participated in "environmental" hearings as far back as the late 1970s and having been involved with the Environmental Law Centre almost from its inception, I may be in a position to identify how environmental decision-making has changed from then until now; although when one is "in the business," one's perspective can be myopic. And, when one's been out of the business, one may not even know what the current state of environmental decision-making is.

However, with those caveats, I would say that the most obvious change has been in the degree of public participation in the process of assessing proposals that will have environmental impacts. In the "old days," you risked being sued for the cost of the delay to an applicant if you opposed a well licence application, thereby triggering a hearing. Even the regulator was unsure how or whether environmental impacts were relevant to the decision it had to make. Today, some environmental assessment processes seem to go on interminably, hearing from every possible interest group that might be impacted, however slight or remote that impact might be. And, the matters or issues that may be raised are limitless. But that's a topic for another day.

What is perhaps discouraging is that I'm not sure environmental decision-making has improved. If our experience in the 1980s is indicative, the degree of scrutiny given to projects with environmental impacts varies with the state of the economy. In the late 1970s and early 1980s, not only were environmental impact assessments required for certain projects, but comparative impact assessments were also done. The methodologies for conducting such comparative assessments were in their infancy, but criteria for comparison were being developed. Then we had the "downturn" of the 1980s which, despite what the energy industry would have us believe, was not entirely due to the National Energy Program. In any event, during this period, the government, and therefore the regulators, was not inclined to subject to scrutiny any project that had the potential to create employment or generate wealth. Then, in the early 1990s, we thought we could afford such wonderful pieces of legislation as the *Environmental Protection and Enhancement Act,* the *Natural Resources Conservation Board Act* and the federal *Environmental Assessment Act*. My "best before date" expired at the end of the millennium; but it seems as if some of the gains made in environmental assessment in the 1990s have been rolled back. Changes to the *Fisheries Act* and the *Navigable Waters Protection Act*, as well as substantive and restrictive changes to environmental assessment, come to mind.

But I would rather not dwell on what may or may not be an accurate portrayal of developments in environmental assessment; although if there is even a kernel of truth in my assessment, the need for organizations such as the Environmental Law Centre and Ecojustice remains as critical today as it was in 1982 when Linda Duncan and her motley crew got the Centre up and running. That motley crew came to include highly-respected environmental scientists, well-known academics, executives of major corporations, even a president of the Canadian Association of Petroleum Producers, in addition to some very thoughtful and militant environmental advocates...and the usual lot of lawyers.

What I'd like to talk about is the Environmental Law Centre moving forward. I have an idea that only came to me when I became a judge. That idea is developed below.

The law develops in many ways. In the field of surface rights and expropriation, it developed because lawyers like Daryl Carter in Grande Prairie spent their entire careers hitting their heads against a seemingly unmoveable judiciary. But, slowly but surely judges were "educated" to more enlightened ways of looking at compensation for rights of entry and other forms of compulsory takings. The reason surface rights law was able to develop was that there were hundreds, if not thousands, of surface rights cases brought before the courts and the boards over the years. The judiciary was incrementally "educated" as result of cases coming before the same judge more than once, as well as a result of repeated trips to the Court of Appeal.

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Admittedly this process was assisted by statutory provisions that granted an aggrieved party the right to a trial in the District Court or the Court of Queen's Bench. Not a situation likely to repeat itself in the area of environmental assessment, what with limited rights of appeal, leave to appeal often being required, and rigorous standards of review applied where leave is granted.

But there's another way to move the law which I am discovering as a judge. It's called judicial education. And it's something the Environmental Law Center ought to consider getting involved in.

Judicial education was virtually unheard of when I started practicing law. However, thanks to visionaries like the late Justice Brian Dickson and our own Justice Bill Stevenson, the National Judicial Institute (NJI) was established in 1988. The case for sophisticated judicial education delivery was made compelling by the enactment of the *Charter,* which didn't exist when most judges went to law school. But almost immediately other courses were developed in areas of the law with which judges had little experience: aboriginal rights, science and technology, gender equality and cultural diversity, to name but a few. Some lawyers, myself included, who witnessed prior attempts at judicial education complained bitterly about who was getting access to the judges and what judges were being taught. There are impartiality and independence issues engaged anytime someone gets access to a judge for "education" purposes. But the NJI is alive to these issues and develops programs accordingly.

The quality of NJI continuing legal education programs is second to none. However, based on my limited exposure to its curriculum, there appears to be a paucity of courses on environmental law and in particular environmental impact assessment which, of course, has a legal as well as a scientific component.

NJI programs are developed in a number of different ways. Sometimes they are held in response to judges' requests for courses. Sometimes suggestions for courses come from academics. Sometimes program ideas come out of public inquiries, such as the Goudge Inquiry into Pediatric Forensic Pathology in Ontario where the commissioner identified a need to educate judges in how to deal with scientific evidence. Public inquiries into wrongful convictions have also resulted in courses on how to avoid them.

Which takes me back to the early days of the Environmental Law Centre. There were some of us at the start who wanted the Centre to engage in environmental advocacy; but our funding source, the Alberta Law Foundation, did not permit us to represent clients. We got ourselves into trouble at the Lodgepole Inquiry "representing" an intervener group. As a consequence, we had to make sure we refrained from advocacy. That is, we had to forego one of the means of influencing environmental decision-making. Instead we concentrated on education, among other things. The Centre's education efforts were directed at the public, at those impacted by facility applications and at those who were free to advocate for the environment. What I am suggesting is that in addition to those education efforts, the Centre get into the business of educating environmental decision-makers.

That is, the Centre should approach NJI with proposals for judicial education. NJI is receptive to such proposals. Suggestions may be submitted to the NJI's Curriculum Advisory Committee which is a sub-committee of its Board of Governors. Proposals should contain a properly thought-out plan. Identify the perceived need of the judiciary. Establish learning objectives. Propose specific course content. Identify faculty. Partner with others. And don't just limit these proposals to the judiciary. Target quasi-judicial administrative tribunals as well, perhaps through the Canadian Association of Administrative Tribunals.

What judicial education accomplishes is to make courts and tribunals receptive to and understanding of the arguments that inevitably will be put to them by environmental advocates. It's doing indirectly what the Centre is prevented from doing directly.

In conclusion, I congratulate the Environmental Law Centre on 30 years of public service and wish the Centre all the best going forward. •

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ABOUT THE ELC

At the Environmental Law Centre (ELC) we envision an Alberta where the environment is a priority. We see a society where environmental concerns guide our choices. We believe that if we make the right choices, future generations will enjoy a clean, healthy and diverse environment protected by strong, effective laws.

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CONSERVATION EASEMENTS IN ALBERTA:
AN ENVIRONMENTAL LAW CENTRE SUCCESS STORY

By Brenda Heelan Powell, *Staff Counsel*

Over the past 30 years the Environmental Law Centre (ELC) has had many success stories, including our involvement in developing several key pieces of provincial and federal environmental legislation, publishing numerous resource books and providing environmental law information to thousands of Albertans. One success story near and dear to our hearts is the adoption of conservation easement legislation in Alberta.

What is a conservation easement?

Approximately one third of the land in Alberta is owned and managed by private landowners.[1] This means that private landowners play a key role in the conservation of natural landscapes and habitat - such as wetlands, woodlands and native grasslands - in Alberta. Conservation easements are an essential tool for facilitating private conservancy of Alberta's natural landscapes and habitats.

A conservation easement allows a landowner to enter an agreement with a qualifying organization to preserve the natural values of the land. With a conservation easement, the landowner maintains ownership of the land but imposes restrictions on the use of the land. These restrictions are designed to preserve the natural values of the land. Once registered on title, the conservation easement binds the current and all future owners of the land.

The ELC's role in developing conservation easement legislation

Prior to the introduction of conservation easement legislation, there was no clear legal mechanism to facilitate private conservancy, which meant landowners had to rely on common law tools not particularly well suited to the task. Recognizing this hurdle to private conservancy, the ELC drove the discussion that ultimately led to the adoption of conservation easement legislation in Alberta.

In 1991, the ELC published *Legal Mechanisms for Private Land Conservancy in Alberta: A Law Reform Proposal,*[2] which outlined the demand for private conservancy and recommended legal reforms to facilitate private conservancy. Subsequently, in 1994, the ELC held a conference that examined the legal issues and law reform requirements for private conservancy. The ELC continued its work on this issue and, finally, in 1996, conservation easement legislation was introduced into Alberta law.

Conservation easement legislation was originally introduced as part of the *Alberta Environmental Protection and Enhancement Act*.[3] At that time, conservation easements could be used only for the purposes of supporting conservation of biodiversity, scenic beauty or both. Since 2009, the purposes for which a conservation easement may be created have been expanded and can be found in the *Alberta Land Stewardship Act,*[4] which now houses Alberta's conservation easement legislation.

The story continues...

Even after the introduction of conservation easement legislation in Alberta, the ELC has continued to push for further education and reform in this area. Over the years, the ELC has published numerous guides, articles and briefs about the law of conservation easements.[5]

The ELC's work with conservation easements is ongoing. For example, the ELC and the Miistakis Institute recently undertook an applied research project examining various legal and policy questions related to conservation easements for agriculture. This project resulted in the report entitled *Conservation Easements for Agriculture in Alberta – A Report on a Proposed Policy Direction*.[6] In the future, the ELC plans to develop new guidance documentation on conservation easements along with a supporting website. •

[1] From the Alberta Land Trusts Alliance website at http://www.landtrusts-alberta.ca/aa_project.php?act=3.
[2] Arlene Kwasniak, *Legal Mechanisms for Private Land Conservancy in Alberta: A Law Reform Proposal* (Edmonton: Environmental Law Centre, 1991).
[3] At the time, the *Alberta Environmental Enhancement and Protection Act*, S.A. 1992, c. E-13.3; now R.S.A. 2000, c. E-12.
[4] *Alberta Land Stewardship Act*, S.A. 2009, A-26.8.
[5] See, for example, Arlene Kwasniak, *Conservation Easement Guide for Alberta* (Edmonton: Environmental Law Centre, 1997); Jason Unger, *Conservation Easements in Alberta: Practical and Legal Reforms to Facilitate Easement Effectiveness* (Edmonton: Environmental Law Centre, 2007); and Jason Unger, *Legal Aspects of Conservation Easements* (Edmonton: Environmental Law Centre, 2008). The ELC also presented a conference in 1998, the papers for which can be found in *A Legacy of Land: Conservation Easements and Land Stewardship, a conference presented by the Environmental Law Centre in Edmonton, Alberta, June 18-19, 1998* (Edmonton: Environmental Law Centre, 1999)
[6] Available at https://www.landuse.alberta.ca/LandUse%20Documents/Conservation%20Easements%20for%20Agriculture%20in%20Alberta%20-%202012-03.pdf.

The story as it unfolded on the pages of *News Brief*

Why Private Conservancy is so Hard to Effect in Alberta, (1994) *News Brief* Vol.9, No. 2
At Last! Private Conservancy Legislation, (1996) *News Brief* Vol. 11, No. 2

WHEN YOU SAY JUMP, I SAY...
APPROACHES TO GOVERNANCE FOR ENVIRONMENTAL OUTCOMES

By Jason Unger, *Staff Counsel*

When we speak of environmental outcomes and governing behaviours on the landscape there are two starkly different paths we might choose. On one path we tell people what they can and cannot do through binding laws. I say jump, you say how high: a command and control model of regulatory management that strictly prescribes acceptable environmental impacts and provides mechanisms for punishment should they not be abided by. On the other path we collectively learn about our impacts on the environment and adapt our behaviours through voluntary measures. This is often what is involved in a consensus based, shared governance model of environmental management. You may say jump, and I might say: "I don't feel like jumping today, thank you very much." Or I might jump to the greatest height I can, exceeding your expectations.

There is no magic answer as to which way is better and there remains a lack of empirical data showing that one system of governance leads to better environmental outcomes. The underlying efficacy of a shared governance approach to source water protection was raised as part of a recent review conducted by the Water Policy Governance Group and reported in *Governance for Source Water Protection in Canada Synthesis Report*. [1] The report asks several important questions, such as:

- When is collaboration an appropriate way to address jurisdictional fragmentation?
- What can collaborative approaches actually achieve?
- How do collaborative approaches compare to other approaches (e.g., traditional regulatory mechanisms)?

No answers to these questions are readily available. A legal background, in the author's opinion, is likely to create a bias toward the command and control system when compared to shared governance, as few things in our world are achieved with some certainty without a binding agreement (statute or common law) operating in the background. From commercial contracts to relationships, we govern ourselves in accordance with the laws of our society. On the other side of the coin is the principle that those most tied to a specific environmental outcome or impact are best suited to address it and their buy-in for a resolution is required.

The arguments against a command and control systems are numerous. Common criticisms include that it is:[2]

- Economically costly;
- Inefficient in attaining regulatory goals; and
- Coercive in a manner that may not result in behavioural change.

Some arguments in favour of a command and control system include that it:[3]

- Creates regulatory certainty for environmental outcomes ;
- Drives innovation; and
- Is neither *ad hoc* nor opportunistic (when effectively enforced).

Proponents of a shared governance model will point to the value of relationship building and avoidance of social and economic costs of law enforcement. Through voluntary negotiation and planning there are networks and relationships built that augment behavior and understanding. The idea is that through networks environmental change is created.[4] Nevertheless, shared governance is fundamentally a form of self-regulation, insofar as negotiation at the governance table and adoption and implementation of any actions that arise are a result of individual (or corporate) choice.

Where shared governance approaches result in programs that contribute funding to promote activities that are protective of the environment one can see the divergent views of how these governance approaches work.

Consider programs around payment for environmental goods and services. Clearly, the federal and provincial governments have legislative authority to regulate the protection of environmental goods and services, and may put in place punitive measures to deter people from impacting goods and services. This is typical for many activities with environmental impacts, insofar as there is an enforceable regulatory or conditioned authorization, with punitive consequences. Where regulatory gaps exist the shared governance approach may result in a proposal for a program for payment of ecological goods and services, effectively saying society will create a mechanism to compensate a party for not harming the environment in which they operate.

Granted, there is also the chance that a mix of regulatory and more voluntary mechanisms could be used to attempt to maintain environmental standards. The Environmental Law Centre has been critical of the shared governance approach in the past and has argued for a hybrid to be used to facilitate implementation of watershed plans in Alberta (see Jason Unger, *Consistency and Accountability in Implementing Watershed Plans in Alberta: A jurisdictional review and recommendations for reform, 2009*.)

A key point of an effective shared governance model is that implementation of a negotiated agreement should be binding or enforceable. *Ad hoc* and opportunistic implementation threatens to undermine the efficacy of watershed plans and may create a high cost for marginal benefits. Basically the argument boils down to, once you have agreed to an outcome, all members should be bound to that outcome. Granted, this will invariably affect the process of reaching the outcome itself and may create pressures to move toward the lowest common denominator in environmental protection. To counteract this it is important to have prescribed and measurable end states at the early stages of a shared governance approach.

So how high will we jump to protect the environment? We might take a collaborative and voluntary process of learning and change in an effort to reach whatever heights we can; or, we might take a more binding approach of dictating the height that must be jumped. Certainly, either approach takes effort and both can result in changing societal behaviours. •

[1] See Rob de Loë & Dan Murray (Ontario: Water Policy Governance Group, 2012) online: <http://www.wpgg.ca/sites/default/files/CWN%20project%20Synthesis%20Report_0.pdf>.
[2] See Jodi L. Short, *The Paranoid Style in Regulatory Reform*, Hastings Law Journal, 2012.
[3] *Ibid*.
[4] David E. Booher & Judith E. Innes, *"Network Power in Collaborative Planning"* (2002) 21 Journal of Planning.

ELC GOES BACK TO OLDMAN RIVER

By Adam Driedzic, *Staff Counsel*

2012 was a big year for the Environmental Law Centre (ELC): a 30th anniversary, a new strategic plan and the final issue of *News Brief*. It was also a big year for me, as I set up a remote office in Canmore and headed south to the Crown of the Continent.

Curiously enough, 2012 was also the 20th anniversary of a trip to the Supreme Court of Canada over a dam that was already built, and I think that trip holds lessons for anyone venturing into Southern Alberta.

Crossing from the Bow River watershed into the Oldman is somewhat of a pilgrimage for environmental lawyers of the "public interest" variety. It isn't just that Alberta's most iconic landscape hits you suddenly. Looking at the cases and legislation cited in the ELC's Core Environmental Principles reminds one that this region has birthed and killed countless attempts at a sustainable society. It's a reminder that the divisions in this society – north-south, urban-rural, corporate-human – are real. It's a place of long memories, and it was an honour to discover that the ELC hasn't been forgotten.

Having to re-read *Friends of the Oldman River*[1] was more of a chore. What stuck in law school is that jurisdiction over the environment is shared by the provinces and the federal government because the environment cuts across sections 91 and 92 of the *Constitution Act, 1867*. Modern federalism allows for overlapping jurisdiction, for example a provincially authorized dam in navigable waters.

Had I stayed awake, I might have recognized Alberta's classic conflation of environmental law and politics: alleging that the feds are sticking their nose into provincial business even though provinces have no inter-jurisdictional immunity; complaining that federal environmental assessments are duplicative when the provincial version is deficient in public participation and independent review.

I even recall a glimmer of environmental justice and democracy in the finding that public rights can prevail over proprietary interests.

Once I started practicing, though, darker messages sunk in:

- The best prospect for litigation "success" is often dry judicial reviews of administrative decision-making procedure. Environmental issues get lost under standards of review and discretionary remedies.

- Representatives of legitimate public concerns get typecast as adversaries of their own government. The dissenting judge in *Oldman River* paints environmental groups as busybodies, consuming taxpayer resources and benefiting from delay. Flexing some muscle has helped environmental organizations gain a spot in less adversarial processes, but the form of recognition is as a special interest "stakeholder," not a public service provider.

- Alberta's legal fallacy survived in the court of public opinion. Even environmental groups in this province don't contest a hands-off federal government like they do elsewhere.

- The politicization of environmental law increased. One reason why today's courts haven't developed the principled environmental jurisprudence of yore is that they haven't had the chance. That may change given the signs of haste and disregard in contemporary legislatures.

None of this was on my mind as I headed south. My work was to help other organizations understand regional planning under the Land Use Framework and the *Alberta Land Stewardship Act* (*ALSA*). The existence of the Oldman Dam simply encouraged me to focus on the headwaters. The last time I visited the Rocky Mountain Forests Reserve I only saw three other people. All were fly fishermen, and they were catching fish. That was years before the *Land Use Framework* admitted that Alberta has reached a "tipping point"; that the natural world is being pushed to its limits; that the "old rules" no longer work.

If protecting the environment was one of the "major challenges of our time" twenty years ago, that challenge has only grown. The benefits provided by the upper watershed cannot be replaced by engineered water storage. It's worth revisiting the legal issues that fueled *Oldman River*. They are tempting to glaze over, yet strikingly relevant today:

- The birth of environmental legislation and departments did not overcome the fact that governments have countless branches whose policies often conflict. The challenge is to ensure that these agencies take environmental considerations into account. One option is statutorily-enabled, Cabinet-approved

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Image: Upper Oldman Watershed by Adam Driedzic

guidance for "decision-makers." Statutory guidelines would differ from typical ministerial policies in that they would be for all purposes a "regulation." Such policies are not required to be made, but if made would be binding. Regulatory agencies with approval powers would be required to make supplementary socioeconomic and environmental considerations. This is an added duty that agencies cannot avoid through a narrow interpretation of their mandate. That is how Justice LaForest described the now defunct "Environmental Assessment Review Process Guidelines Order,"[2] but I think it equally describes the idea behind *ALSA* Regional Plans.

- Binding the Crown can be difficult. As Justice La Forest wrote, in the absence of a clear expression of intention, one must be "irresistibly drawn to that conclusion through logical inference."[3] "The circumstances which led to the enactment" and "the mischief to which it was directed" must make it binding by "necessary implication." That might be the case if the parent legislation were the Land Use Framework, but it's not. The parent is *ALSA*, with its vague purpose of planning for the future. It's an Act that provides broad discretion and limited accountability, and it can produce plans of the same nature. There is plenty of cynicism in Southern Alberta to remind us that we've been here before. Watershed function has been an unenforced priority for the Eastern Slopes for longer than Alberta has had environmental legislation.

In law school I learned that the most important message in any case is often found between the lines. I think the perennial lesson for Alberta is the failure of centralized, technocratic decision-making to uphold local values. What passes as "sustainable development" still has a disproportionate impact on the communities where it occurs. Communities want a voice. They want to see that voice reflected in decisions, and they want those decisions to shift the locus of control. No one likes having their future determined by distant powers, and Edmonton isn't any closer than it was 20 years ago.

The Oldman Dam was hardly a surprise. It took years of planning. Experts and advisory committees produced reports. Public consultations were held. Local people and environmental groups participated. Yet one had to wonder if decisions were already made. I think that sentiment equally applies to recent consultations on the Advice of the South Saskatchewan Regional Advisory Council.

I still feel that Alberta is experiencing the best chance to meet its environmental challenges in decades. The expressed intention of regional planning is still for a non-adversarial policy development process to produce statutory instruments that are binding on decisions-makers. There is official recognition that private efforts help achieve public environmental goals and therefore warrant public support. It's possible that outside environmentalists and local landowners haven't seen such incentive to bridge divisions since, well you know when. The mistakes of the past can be avoided, and if they aren't, people have long memories. •

1 *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3.
2 *Ibid.*, at pages 19 and 20.
3 *Ibid.*, at page 59.

Original image URL: http://www.flickr.com/photos/blmiers2/6763109689/
Title: A path through the winter snow

A LOOK BACK AT THE WHALEBACK HEARING (ALMOST) 20 YEARS LATER: THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME

By Gavin Fitch, *Barrister & Solicitor*

I had the good luck to be a junior counsel at the now famous Whaleback hearing. It was 1994 and Amoco Petroleum applied to the Energy Resources Conservation Board (ERCB) for approval to drill an exploratory sour gas well in the beautiful and environmentally significant Whaleback area of southwestern Alberta. Amoco said that if the exploratory well was successful they might drill up to twenty wells in the area. The ERCB denied Amoco's application.

Within two years of the Whaleback hearing, the ERCB would be subsumed (along with the Public Utilities Board) into the Alberta Energy and Utilities Board (EUB) as part of Premier Ralph Klein's cost-cutting program. Twelve years after that, the ERCB would return—along with the new Alberta Utilities Commission—when the EUB imploded in the wake of the Edmonton to Calgary power line "spygate" scandal. Now, the ERCB is slated to be dissolved again and replaced by the "Alberta Energy Regulator" under Bill 2, the *Responsible Energy Development Act* (*REDA*). It's been a tumultuous eighteen years!

The Whaleback hearing is often cited as the only instance in Alberta history that an energy project has been rejected on environmental grounds (at least until the Cenovus Suffield infill drilling project was denied last year by the federal government). Some of the issues that arose in the Whaleback and which have continued to be contentious over the years since include the following.

The role of Alberta Environmental Protection (now Alberta Environment and Sustainable Resource Development) in the hearing

Interveners said at the Board's pre-hearing meeting that they wanted staff from Alberta Environmental Protection (AEP) to testify at the hearing. AEP said no. Then, before the hearing, AEP's local fisheries biologist wrote a letter expressing concerns with the project. On behalf of our clients, we asked the ERCB to subpoena the biologist to attend. The Board refused to compel him to attend because, it said, his evidence was not "critical" – a test which I have always argued is effectively impossible to meet.

Some time after the hearing, the Province adopted a policy of not formally participating at ERCB and other similar hearings. And the ERCB has continued to follow to this day its de facto policy of never compelling witnesses to attend their hearings. This has made it difficult if not impossible for interveners to address at hearings the content and applicability of provincial environmental policies, which are frequently in dispute.

A recent example was the Petro-Canada Sullivan Creek project to drill several sour gas wells and construct a pipeline on Crown land in Kananaskis Country. As part of its ERCB application materials, Petro-Canada filed documents showing it had already received surface dispositions from Alberta Sustainable Resource Development (SRD). Petro-Canada relied on these dispositions (and notes of meetings and discussions with SRD) in support of their proposed well and pipeline locations. We argued that the only way to test this "evidence" was to question SRD, but the Board refused to compel an SRD representative to attend the hearing.

Under *REDA*, the provincial Crown will be entitled to appear at Alberta Energy Regulator hearings, be represented by counsel, present evidence, cross-examine and submit argument. This is no change from the current legislation, but what is different is that until now if the Crown did present evidence it was required do so in accordance with the normal rules; i.e., including being subject to cross-examination. *REDA* will allow the Crown to simply file a written statement in a hearing without presenting a witness to speak to the statement and without being subject to cross-examination.

Standing and intervener funding

There were two main intervener groups at the Whaleback hearing, one comprised of local ranching families (the Hunter Creek Coalition) and the other a more broad-based coalition of environmental activists (the Whaleback Coalition). The Whaleback Coalition included James Tweedie, who owned land within the Emergency Planning Zone for the proposed well. Based on Mr. Tweedie's membership, the Whaleback Coalition was granted standing to participate in the hearing. It applied for but was denied advance funding, on the basis that the Board was not convinced that Mr. Tweedie resided close enough to the well to qualify for local intervener funding. It effectively held that without more evidence from Mr. Tweedie at the hearing, the Board was not in a position to make a determination on intervener costs.

Notwithstanding, the Whaleback Coalition was a full participant at the hearing and submitted through Mr. Tweedie a claim for local intervener costs after the hearing concluded. The Board ruled that Mr. Tweedie did not qualify as a local intervener, noting that a person may be an intervener at a hearing but not a local intervener for the purposes of costs. However, the Board went on to say that because the information provided by Mr. Tweedie and the Whaleback Coalition was helpful, it had decided to provide $30,000 as reimbursement for their hearing costs.

Since the Whaleback hearing, I cannot think of another case where a person was granted standing as a full participant in an EUB or ERCB hearing but then denied local intervener funding—until the third case of the *Kelly* trilogy. There, the Board held a hearing at which Mrs. Kelly had standing to intervene but then denied her local intervener costs. This denial was overturned by the Court of Appeal. The Court used strong language to endorse the importance of public hearings as a part of the resource development process itself, by giving those who are affected by development a forum in which they can put forward their interests and concerns. The court stated that in "today's Alberta, it is accepted that citizens have a right to provide input on public decisions that will affect their rights."

REDA has sparked significant concern because it does not include provisions entitling potentially directly and adversely affected persons to a hearing or local intervener costs—they are left to the discretion of the new Alberta Energy Regulator.

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While standing and local intervener funding are not, strictly speaking, issues of environmental law, the practical reality is that unless there is someone who has standing to trigger a public hearing, the environmental review of energy resource projects takes place within a black box. At the Whaleback hearing, and many others since, interveners retained credible scientific and environmental experts who provided the Board with the "other side of the story" from the applicant. As well, intervener counsel subject the applicant's environmental experts to searching cross-examination. All of this improves the quality of the information on which the Board bases its decision—something which in and of itself is in the public interest. The problem of having someone in the process who will "speak for the environment" is particularly acute in the case of projects on Crown land where there are no people close enough to meet the test for standing.

Land use planning as a framework for assessing environmental issues

The Whaleback hearing was an early example of the ERCB considering an oil and gas development in the context of the provincial Eastern Slopes Policy and "Integrated Resources Plans" (IRP) developed and administered by Alberta Environment under the policy.

Whenever the ERCB holds a public hearing it must consider whether approval of the application would be in the public interest, having regard to social, economic and environmental effects. In the Whaleback hearing, the Board carried out its public interest analysis having regard for the planning objectives for the area established by the Province in the local IRP.

For the Whaleback, the local IRP placed the highest management priority on protection of ecological and wildlife values and stated that oil and gas development should not occur unless the applicant could demonstrate that "no net loss" of wildlife habitat and ecological values would occur. The Board found that Amoco failed to meet this standard.

In many subsequent cases of proposed oil and gas development in the southern Eastern Slopes, the ERCB wrestled with this question of whether development would be consistent with the local IRP. Almost without exception, these proposals (unlike Amoco's application) were approved. The shortcomings of this approach would become apparent, even to the Board.

For example, in 2000 the EUB approved applications by Shell to drill four wells from two padsites south of the Crowsnest Pass in the "Castle-Crown" area. With regard to cumulative environmental effects, Shell acknowledged that the biological thresholds for some wildlife species in the region potentially had already been exceeded. Notwithstanding, the development as proposed was consistent with the local IRP.

In approving the wells, the EUB noted that historically it had turned to the local IRP for guidance as to acceptable forms of activity and development, particularly on Crown lands. However, given the evidence about some biological thresholds having been exceeded, the EUB made the blunt observation that "the publicly available planning tools for the region may now be outdated and inadequate to address the current level of development."

The need for provincial planning to manage cumulative environmental effects was a key driver behind the current "Land Use Framework" and the *Alberta Land Stewardship Act* (*ALSA*). The area encompassing both the Whaleback and the Castle-Crown will soon be part of the South Saskatchewan Regional Plan. Under *ALSA,* all development in the area will have to be consistent with the regional plan. It will be interesting to see if *ALSA* and the new regional planning framework will be any more successful in managing the environmental effects of development than the old IRPs were.

Conclusion

Ultimately, Amoco's application was denied based on the particular facts of the case, the most significant of which was that the Whaleback truly is an incredibly beautiful and unique area. But the environmental and policy issues raised by the application have been fought over again and again in the years since. Although the outcome in most of these subsequent cases was different, that very fact has led (it can be argued) to the recognition that the old planning tools were not working and something new, *ALSA* and the regional plans, was required to ensure that development occurs in a sustainable manner. Hopefully, it will also make the job of the new Energy Regulator a little easier than the ERCB's was. •

FROM THE EDITOR

By Leah Orr, *Communications Coordinator*

With new strategic goals in place, we launched into the year anticipating big changes. 2012 certainly delivered on that front.

The ELC's primary role is to provide information and public education. Like most charities, we do so on a limited budget with limited resources. With that in mind, we had to take a hard look at what we're providing, how we're providing it and whether or not we're reaching our audiences as effectively as possible.

We started by assessing our library and whether or not it was being used enough to justify costs involved with maintaining and expanding the collection. The advice we received from consultants from andornot was pretty clear. Access to the library has decreased annually to the point that only a handful of people access the collection. So, we are in the process of downsizing and finding homes for materials we no longer need.

Next, we turned our gaze to publications. In looking at the numbers, we found that *News Brief* readership has steadily decreased while website and blog traffic has increased. Simply put, *News Brief* content will be seen by more people if we put it out in a different format. So, we've decided that this issue of *News Brief* will be the last. But fear not, dear readers. We will still be generating *News Brief*-style content. However, instead of being put out four times a year in one big package we will roll out standalone articles more frequently as downloadable PDFs on our website and/or blog posts - whichever medium best suits the message. We may even try our hands at video!

The rest of the ELC family and I would like to thank *News Brief* readers and invite you to continue to access ELC materials online. We would also like to thank you for your continued support. It is truly appreciated.

As always you can contact me at 780-424-5099 or lorr@elc.ab.ca with any questions, comments or concerns.

All the best to you and yours in 2013!

ONE APPROACH DOESN'T NECESSARILY FIT ALL (ISSUES): REFLECTIONS ON MULTI-STAKEHOLDER CONSENSUS-BASED DECISION-MAKING IN ALBERTA

By Cindy Chiasson, *Executive Director*

Multi-stakeholder consensus-based decision-making (MCD): not a phrase that easily rolls off the tongue. Nor is it one that is clearly understood at first glance. However, it has been an approach much in vogue in Alberta's environmental policy development over the past two decades, most notably in relation to the Clean Air Strategic Alliance[1] (CASA) and the Alberta Water Council[2] (AWC). My comments in this article are based primarily on my five-year involvement with CASA in the early 2000s, as well as other Environmental Law Centre involvement in CASA and the AWC.

Consensus-based decision-making is a problem solving approach that seeks to include a wide range of diverse interests to reach an outcome accepted by all participants. While there often is voting to determine acceptance of a proposed solution, a majority outcome does not rule; a consensus result requires unanimity. "While participants may not agree with every detail, the end of a successful consensus exercise will see a decision or solution that everyone can 'live with' because it reflects the interests of every person around the table."[3] The process attempts to focus on participants' common interests, rather than positions on issues.

The multi-stakeholder aspect of MCD is used in Alberta as a means of seeking to balance interests and level potential inequities between parties. With CASA and AWC, this has been addressed by grouping participants into broad categories of government, industry and non-government organizations, with roughly the same number of participants from each category.[4] It is this multi-stakeholder element that offers some of the main advantages of MCD, by bringing relevant stakeholders together at the same table and attempting to level the playing field with respect to decision-making engagement. A structured decision-making process with clear rules of engagement is also needed for MCD to work well.

In concept, MCD appears to be a common sense, non-adversarial means of resolving issues that offers participants considerable flexibility and creativity. However, in practice MCD has proven to be messier and more challenging, and perhaps not the best means of addressing some environmental issues. MCD can often be time-consuming, resource-intensive and slow; the basic need to accommodate the schedules and interests of a wide range of stakeholders renders MCD a longer decision-making process than other approaches. During my involvement with CASA, there were non-government stakeholders with relevant interests that did not engage or left the decision-making process, feeling that it moved too slowly.

Original image URL: http://www.flickr.com/photos/deniscollette/8269638492/
Title: Comme des sentinelles sculptées... fourrure de lumière... fantômes dressés dans ma forêt d'hiver...!!!

While the multi-stakeholder aspect of MCD seeks to bring all relevant stakeholders to the process, even where those stakeholder interests are present the right people may not be involved. For MCD to work well, individual participants need to be willing to commit to interest-based discussions and must have the authority to make commitments that bind the stakeholders they represent. In addition, the process seems to work best when stakeholders consistently send the same knowledgeable, prepared participants to the table; the fewer "revolving doors" of participation, the better.

Resourcing can be an ongoing challenge for MCD processes. CASA and AWC both are structured on the basis of a multi-stakeholder board of directors or council, supported by a small staffed secretariat that deals with ongoing administration and decision-making process support. These cores are supported by Alberta government funding. However, initiatives

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to address and resolve specific issues have generally required separate funding, which does not always come from government. In practice, it has been easier to secure funding for initiatives dealing with a very specific issue, polluter or industry sector that may benefit from resolution; for example, it would be easier to identify and fund resolution of an air quality issue linked specifically to the oil and gas sector (such as flaring and venting of fugitive wellsite emissions), as compared to a different air quality issue with broader sources and societal impacts (such as emissions from private motor vehicles).

The other aspect of resourcing that is a constant concern for MCD processes is mitigation of inequality of capacity, including financial resources, as between stakeholders. This is particularly relevant in relation to non-government interests. Many non-governmental organizations have limited funds available to support staff participation in MCD processes and many others rely on volunteers, who would be involved at personal economic disadvantage (that is, they are taking time away from their paying careers to participate) if no financial support or subsidy were provided. Where financial support is available, it tends to be limited to covering a fraction of the actual economic value of time and expertise provided by participants. A concern is that resourcing challenges can create an inadvertent incentive for better-resourced parties to delay items they do not support or favour in an attempt to wear down lesser-resourced opponents, rather than seek genuine resolution of a matter via consensus. This runs the risk of producing "lowest common denominator" outcomes.

One of the key contributors to success of MCD processes is a strong commitment by relevant government decision-makers to implement the results of these processes, as far as is possible. Early commitment and support by such decision-makers reassures the participants that their time and energies are likely to be invested to good use in working to resolve an issue. For example, the successful implementation of the flaring and venting initiative developed by CASA owes much to the Energy and Utilities Board's support and its willingness to legislate the limits and requirements, had they not been implemented on a voluntary basis by the industry. Where responsibility for an environmental issue is spread across various government departments, authorities or jurisdiction, securing this type of commitment can be much more challenging. Another challenge can be where government backs away from its ultimate role as the maker and implementer of policy and legislation, seeking to cast itself instead as "just one of the stakeholders". Such an approach frustrates other stakeholders and can reduce support of the MCD process.

In my opinion and experience, environmental issues that are very focused and technically based seem to be most amenable to resolution through MCD process. The scoping of the issue, identification of stakeholders, and securing of funding all tend to be more straightforward in these instances. In contrast, broad environmental issues that carry significant questions of societal values and subjectivity seem to founder in MCD processes. At the very least, these types of issues bring major challenges in ensuring that all stakeholders and interests are adequately represented.

While MCD processes have resulted in some environmental policy successes in Alberta, such as reduction of oilfield flaring and venting and limitations on greenhouse gas emissions from coal-fired electricity generation, they are not a cure-all. It would be useful for future environmental decision-making to recognize these processes as one tool in the tool box and to carry out further study of MCD processes and their results to determine the types of issues most appropriate for this tool. •

[1] Online: Clean Air Strategic Alliance http://www.casahome.org.
[2] Online: Alberta Water Council http://www.albertawatercouncil.ca/.
[3] Beyond Consultation: Making Consensus Decisions (Edmonton: Clean Air Strategic Alliance, 2005) 2.
[4] Note that AWC makes a further distinction between the Alberta government/provincial authorities and other governments; see online: Alberta Water Council http://www.albertawatercouncil.ca/AboutUs/Members/tabid/56/Default.aspx.

Thank you for your support

As we look forward and plan for the coming year, the whole team here at the Environmental Law Centre is grateful for your interest in environmental law and for the support you showed us in 2012. Your decision to support the Environmental Law Centre is incredibly meaningful, and one we do not take for granted.

Your donation makes a difference. From the average Albertan to government policy-makers, over 200 people and groups received help and advice directly from our counsel and information services. An additional 30,000 people accessed our valuable on-line resources in 2012. Albertans are looking for the answers to their environmental concerns – and you are helping them find the solutions and tools they need to solve them!

You also ensure that reasonable and balanced critiques are heard as Canadians face sweeping changes to our environmental legislation – from Alberta's Single Energy Bill 2 to the Federal Government's omnibus budget bills. The Environmental Law Centre needs your support to continue providing our sound and respected advice on environmental matters.

Please give generously to the Environmental Law Center as you plan your giving for 2013. Tax creditable donations may be made securely online at www.elc.ab.ca or by sending your donation to our office.

We thank you for supporting the Environmental Law Centre. 2013 is sure to be a busy and exciting year for finding innovative solutions to our shared environmental concerns.

From our family to yours, we wish you a prosperous and Happy New Year!

Kim Kiel, *Fundraising Coordinator*