

## **Presentation - British Columbia Update – 2005**

### **17th Annual Environmental Lawyers in Government Conference September 12 – 14, Edmonton, Alberta**

Set out below are recently implemented BC Government initiatives respecting various environmental topics. In addition, jurisprudence and regulatory decisions that may be of interest to other provinces and government lawyers are also listed.

#### **Water / Ground Water / Riparian Areas**

##### **Ground Water Protection / Part 5 of *Water Act***

In 2001, the legislature approved amendments to the BC *Water Act* as part of a broader initiative to improve drinking water protection in British Columbia. These amendments added a new "Part 5" to the Act entitled "Wells and Ground Water Protection". The new provisions took effect on November 1, 2004.

##### Part 5 of the *Water Act*:

[http://wlapwww.gov.bc.ca/wat/gws/part5\\_water\\_act/part5\\_water\\_act.pdf](http://wlapwww.gov.bc.ca/wat/gws/part5_water_act/part5_water_act.pdf)

The Ground Water Protection Regulation (GWPR) will become effective November 1, 2005. The GWPR deals with aspects of well construction to enhance ground water protection — i.e., installing effective surface seals around wells, securely capping and flood proofing wells, and permanently closing unused wells to protect ground water quality. The GWPR also establishes the qualifications for well drillers and well pump installers and provides for a provincial registry of those possessing the qualifications. However, there is not yet any licensing of ground water.

Registration provisions in the GWPR for qualified well drillers and qualified well pump installers came into force on November 1, 2004, as well as amendments to the *Water Act* providing for ground water protection. As noted, on November 1, 2005, the remainder of the GWPR provisions will take effect.

- Prior to the GWPR, there was no regulation in British Columbia focussing specifically on ground water or standards for well construction, maintenance, well closure and qualifications for well drillers and well pump installers. Unregulated drilling activities and lack of enforceable well construction standards have contributed to ground water quantity and quality problems in some areas of the province.

Backgrounder: [http://wlapwww.gov.bc.ca/wat/gws/gws\\_reg\\_back/back.html](http://wlapwww.gov.bc.ca/wat/gws/gws_reg_back/back.html)

Regulation: [http://wlapwww.gov.bc.ca/wat/gws/gws\\_reg\\_back/gwpr\\_oics.pdf](http://wlapwww.gov.bc.ca/wat/gws/gws_reg_back/gwpr_oics.pdf)

## **Riparian Areas Regulation / section 12 of *Fish Protection Act***

Recently, the Streamside Protection Regulation was replaced by the Riparian Areas Regulation (RAR). The purpose of these regulations, made under the authority of section 12 of the BC *Fish Protection Act*, is to provide directives to local governments with respect to the exercise of zoning and rural land use bylaws under Part 26 of the BC *Local Government Act* to ensure that bylaws are consistent with the Regulation or, alternatively, that local government bylaws and permitting “meet or exceed” the requirements of the RAR. The goal is to proactively protect riparian fish habitat, while allowing residential, commercial, and industrial development to proceed if it does not impact riparian fish habitat.

The RAR relies on the work of Qualified Environmental Professionals, rather than being dependent on local, provincial and federal government resources. In developing the RAR, the Ministry of Environment (formerly Water, Land and Air Protection) worked in collaboration with the Union of British Columbia Municipalities and the Department of Fisheries and Oceans.

The RAR calls on affected local governments, by March 31, 2006, to protect riparian areas during residential, commercial, and industrial development by ensuring that proposed activities are subject to a science based assessment conducted by a Qualified Environmental Professional. Some local governments have already implemented RAR requirements but some have required additional time. Local governments needing extra time, to ensure the orderly and efficient implementation of the RAR, have been given extra time to implement it.

The RAR will apply only to local governments located on the east side of Vancouver Island, the Lower Mainland and the Southern Interior, as these are the parts of the province that are experiencing the most rapid urban growth. The RAR does not apply to agriculture, mining or forestry-related land uses. Riparian protection for these activities are provided by other initiatives.

The purpose of the RAR is to provide protection for the features, functions and conditions that are vital in the natural maintenance of stream health and productivity. These vital features, functions and streamside area conditions are numerous and varied and include such things as sources of large organic debris (fallen trees and tree roots), areas for stream channel migration, vegetative cover to help moderate water temperature, provision of food, nutrients and organic matter to the stream, stream bank stabilization and buffers for streams from excessive silt and surface runoff pollution.

The RAR model uses Qualified Environmental Professionals, hired by land developers, to assess habitat and the potential impacts, develop mitigation measures and avoid impacts of development to fish and fish habitat, particularly

riparian habitat. This shifts the cost of assessing developments to the land developer, allowing governments to focus on monitoring and enforcement within their respective jurisdictions. By conscientiously following the assessment procedure set out in the RAR, the Qualified Environmental Professional and the land developer will have applied due diligence in avoiding a harmful alteration, disruption or destruction of riparian fish habitat. In the event that a harmful alteration, disruption or destruction cannot be avoided, an authorization must be obtained from Fisheries and Oceans Canada before development can proceed.

The assessment methods attached as a schedule to the RAR are a key component of a regulatory regime for riparian protection that is intended to be clear and measurable, but does not rely exclusively on default set backs. The assessment is based on the best available science with respect to riparian habitats.

The assessment methodology provides direction to Qualified Environmental Professionals on how to assess impacts, how to determine setbacks based on site conditions, and what measures need to be employed to maintain the integrity of the setbacks. Qualified Environmental Professionals, for the purpose of this regulation, will have to certify they have the qualifications, experience and skills necessary to conduct the assessment. The assessment will form the content of notifications by development proponents to regulatory agencies. The Ministry will provide local governments confirmation of notifications, enabling them to move forward in approving urban developments without taking on liability for reviewing and approving riparian setbacks.

Background:

[http://wlapwww.gov.bc.ca/habitat/fish\\_protection\\_act/riparian/riparian\\_areas.html](http://wlapwww.gov.bc.ca/habitat/fish_protection_act/riparian/riparian_areas.html)

RAR:

[http://wlapwww.gov.bc.ca/habitat/fish\\_protection\\_act/riparian/documents/regulation.pdf](http://wlapwww.gov.bc.ca/habitat/fish_protection_act/riparian/documents/regulation.pdf)

Assessment Methods:

[http://wlapwww.gov.bc.ca/habitat/fish\\_protection\\_act/riparian/documents/assessment\\_methods.pdf](http://wlapwww.gov.bc.ca/habitat/fish_protection_act/riparian/documents/assessment_methods.pdf)

### **Post Drinking Water Protection Act**

Following on increased enforcement of BC's *Drinking Water Protection Act*, we have seen an increase in the number of private operators "walking away" from private water systems. The dissolution of companies that own and operate water systems as water utilities has resulted in the escheat of private water system assets to the government under the BC *Escheat Act*.

In such cases, it has proven difficult to encourage water users to organize themselves in another way to take on responsibility for operating the water system, whether that be through the creation of a society or another company or by approaching local government to provide that service in the service area. Some local governments are reluctant to take over operation of these water systems, particularly if water users are unwilling to meet the financial commitments required to formally maintain or upgrade the escheated water systems.

We would be interested in finding out whether other provinces have experienced similar problems and what they are doing to address them.

## **Wildlife / Aquaculture**

### **Permit and Authorization Service Bureau**

Numerous prohibitions under the BC *Wildlife Act* are balanced by a power to permit the prohibited activity. A regional manager (9 regions) has the power to issue the permit. Permits were previously issued in region. As a cost saving/efficiency measure, the issuance of permits is now done centrally, from Victoria. The local regional manager still makes the decision, but the applications and facilitation of the process is done centrally. This has resulted in more consistent approaches across the province.

<http://wlapwww.gov.bc.ca/pasb/index.htm>

### **“De-Permitting”**

As an additional efficiency measure, the *Wildlife Act* is moving towards reducing the exercise of discretion: less discretion exercised = less person hours of effort. This largely takes the form of exemptions. Whereas previously one might have needed a permit to do a certain, arguably innocuous, activity, the need for a permit to do that thing in defined circumstances is eliminated by exemption under the regulations.

### **Grizzly Bear Management**

Grizzly bear hunting in BC was closed for a short time, but was soon reopened when the government changed 4 years ago. The reopening of the hunt was coupled with funding to study the best way to manage bear harvest. A new management system was created and vetted by a panel of experts. Grizzlies are now managed on the basis of Grizzly Bear Population Units (GBPU) - the province is divided into 57 areas. Whether hunting is allowed and the harvest level permitted is a function of the health of the bear population in a given GBPU.

Opportunity to hunt is split roughly equally between guided and non-guided hunters.

<http://wlapwww.gov.bc.ca/wld/grzz/>

### **Local government powers - Right to farm**

The urban / rural interface is the source of ongoing conflict between resource use and homeowner preferences. This is seen in at least two ways in BC: concerning aquaculture and agriculture.

#### **1. Greenhouse Farming**

There is significant tension between some municipalities that are partly rural and partly residential and the farmers who farm there. BC's lower Fraser Valley has a climate very conducive to profitable greenhouse vegetable growing operations. There are literally acres and acres of land under glass, heated and artificially lit at night. This bothers the neighbours and is seen as harmful to wildlife, especially birds. These operations are protected by right to farm laws, but that does not discourage some municipalities from trying to constrain the operations in various ways in an effort to circumvent the right to farm philosophy.

<http://www.agf.gov.bc.ca/resmgmt/sf/>

#### **2. Aquaculture**

Other local governments exercise their powers in areas that are well suited for aquaculture: finfish or shellfish. Some have taken measures to restrict aquaculture, which was not well protected by right to farm laws. The government has now created a regime to allow for the establishment of aquaculture reserves: areas in which right to farm applies to aquaculture operations, existing or merely planned. We are not aware of any reserves having been created yet. (This parallels BC's Agricultural land reserve system - most of BC's agriculturally productive land is provincially zoned to prevent its use for anything but agriculture.)

<http://www.agf.gov.bc.ca/fisheries/index.htm>

### **Aquaculture - Sea lice prosecution**

Sea lice are natural parasites of salmon. Too many sea lice on too small a salmon means death for the salmon. Some allege that marine cage salmon farms harbour dangerous levels of sea lice which escape and attack juvenile salmon swimming past the net cages, harming wild populations.

An information has been sworn by a private citizen (this is unusual. In BC the normal process is for enforcement officials to lay charges, but only after obtaining approval from Crown Counsel) alleging that a fish farmer and the federal and provincial governments have committed the offence of unlawfully releasing fish (sea lice) into fish habitat, contrary to the federal *Fisheries Act*.

Since the provincial Crown is itself an accused, the matter has been referred to a special prosecutor - an outside lawyer not otherwise employed by the government. The special prosecutor is to determine whether charges should be laid and a prosecution undertaken. If charges proceed, the special prosecutor would take conduct.

### *Park Act / Turtles*

*West Kootenay Community EcoSociety v. British Columbia (Ministry of Water, Land and Air Protection)* [2005] B.C.J.No.1224, 2005 BCSC 784 (BCSC); [2005] B.C.J.No.1137, 2005 BCSC 744 (BCSC).

- The decision of the Minister of Water, Land and Air Protection (now Environment) to allow the relocation of a park access road was overturned on judicial review. Grohman Narrows Provincial Park had a pond/wetland/marsh area which provided natural habitat to several provincially significant blue-listed plant, animal and insect species – including the painted turtle. (Blue-listed means that the species are at risk but not extirpated, endangered or threatened.)
- The Court found that the decision of the Minister to move the access road was not authorized by BC's *Park Act* because the decision to move the road was not to improve or develop the Park, but rather to accommodate the developer. In the Court's view, if a decision will result in a disturbance to a natural resource in the Park, it can only be carried out if it is made in the context of improving, using or developing the Park. As it was intended to assist the developer, the decision was held to be invalid.

## **Environmental Protection / Waste Management / Hazardous Wastes / Contaminated Sites / *Integrated Pest Management Act***

### ***Integrated Pest Management Act and Regulation***

BC's *Pesticide Control Act* was repealed and replaced by the *Integrated Pest Management Act*. This statute deregulates a number of commonly used pesticides so that use permits will no longer be required as long as those pesticides are applied in accordance with an approved plan. Generic plans are approved for 5 year periods and set out general use requirements similar to those on federally approved pesticide labels. Actual use only requires notice to the government.

However, permits are still required for other pesticides. A summary of the new *Integrated Pest Management Act* and Regulation is available and outlines the components of this new legislation and general requirements for pesticide use and sales.

<http://wlapwww.gov.bc.ca/epd/epdpa/ipmp/index.html>

[http://wlapwww.gov.bc.ca/epd/epdpa/ipmp/pesticide\\_pdfs/leg\\_summary.pdf](http://wlapwww.gov.bc.ca/epd/epdpa/ipmp/pesticide_pdfs/leg_summary.pdf)

### **Hazardous Wastes**

*Tristar Brick and Block Ltd. v. Canadian Petroleum Corp.*

The Ministry is monitoring a case concerning responsibility for the removal and disposal of special wastes. A substantial quantity of hazardous wastes were left in a rented warehouse. The tenant, Canadian Petroleum Corp. (CPC), went into receivership. While a proposal was made in the receivership, the landlord, Tristar Brick and Block Ltd., put an end to that arrangement after the tenant defaulted under the proposal.

The landlord obtained an order to terminate the tenancy and the tenant was required to remove the substances and to give up possession. Subsequently, the landlord obtained an eviction order following which the tenant claimed to have no further responsibility for the stored waste as a result of the eviction order.

Initially, the Ministry engaged environmental contractors to make an inventory of the substances. Subsequently, the Minister made an emergency declaration under the *Environmental Management Act* after the contractors discovered the presence of leaking containers of highly volatile substances, including highly explosive fumes. The contractors were then tasked with removing the substances.

At present, \$1.5 million has been committed to the clean up. The Ministry will be looking at cost recovery, including from the landlord, tenant and possibly from waste generators who had brought substances to the site. During the operation of its temporary storage facility, the tenant may have mixed some of the substances, which may complicate action against the waste generators.

The tenant, CPC, was prosecuted and convicted of charges under the Act. Fines totalling \$1,000 each on two counts were ordered, as well as \$4,000 on each of those counts as contributions to the Habitat Conservation Trust Fund. So, the total was \$10,000.

### **Cases/Issues for Provincial Round Table – Contaminated sites and environmental litigation**

- Crown Contaminated Sites Policy/Program

<http://srmwww.gov.bc.ca/clrg/ccsp/index.html>

<http://srmwww.gov.bc.ca/clrg/ccsp/policy.html>

- Brownfields /Problem Sites
- Roster- Liability Issues
  - Downloading of government functions

### **Cases**

*CNR Co. v. ABC Recycling Ltd.*, 2005 BCSC 647 (currently under appeal)

- “full” indemnification of legal costs recoverable as reasonably incurred costs of remediation
- whether costs of “Cadillac” approach of clean up of site were recoverable

*Imperial Oil v. McAfee*, 2005 BCCA 402

- Municipality not able to impose remediation of off-site contaminants as condition of development permit

*Houweling Nurseries v. District Director of the GVRD et al.*, 2005 BCSC 894

- Jurisdiction of EAB to deal with refusal to amend permit

*427958 B.C. Ltd. v. BC Hydro & Power Authority (“Super-Save”)* (2004), 11 C.E.L.R. (3d) 163 (Env. App. Bd.) <http://www.eab.gov.bc.ca/waste/2004was007a.pdf>

- Director issued approval in principle for remediation of contaminated lands pursuant to remediation plan; corporation which owned property adjacent to Hydro’s property had soil also contaminated – wanted AIP to extend to clean up of adjacent lands
- Board concluded that adjacent land owner was not an “aggrieved person” under Waste Management Act and did not have standing to challenge issuance of AIP – Director not obligated to address contamination of adjacent property

*Squamish Terminals Ltd. v. Director of Waste Management* (EAB Appeal No. 2004-EMA-002(a)) <http://www.eab.gov.bc.ca/ema/2004ema002a.pdf>

- Similar issue to *Super Save*



*West Vancouver v. HMQ – BC and HMQ – Canada*, 2005 FC 593 (under appeal)

- Challenge to environmental assessment in context of Sea-to-Sky Highway construction
- Whether mitigation methodology had to be determined in assessment itself, or could be deferred, in determination of adverse environmental impacts
- New expert evidence and other evidence not before decision maker not to be considered by trial judge nor by Court of Appeal 2005 FCA 218

*Do Rav Right Coalition v. Hagen*, 2005 BCSC 991 (under appeal)

- Allegation of failure to consult in respect to changes to proposed project approved under environmental assessment project

*Early Recovered Resources v. HMQ – BC*, 2005 FC 995

- Constitutionality of provincial log salvaging scheme (plaintiff argued log salvage fell within navigation and shipping)
- Plaintiff trying to establish environmental damage caused by logs not salvaged, premium should be paid under International Convention on Salvage

*BC Hydro and Power Authority v. BC (Environmental Appeal Board)*  
[2005] 1 S.C.R. 3, 2005 SCC 1; 2003 BCCA 436

- Corporate amalgamation did not have effect of extinguishing responsible person status under BC contaminated sites legislation
- Issue of retroactivity provisions / use of international treaties in interpretation of domestic legislation not dealt with by court

*Burrardview Neighborhood Assn. v. Vancouver (City)*, 2004 BCCA 104, Supreme Court of Canada No. 30317

- Definition of “public property” under s.91(1A) may impact provincial ability to regulate on lands “controlled” by Canada

## ***Environmental Assessment Act***

*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*  
2004 SCC 74 (SCC) (extract from head note):

- A mining company sought permission from the BC government to re-open an old mine. The Taku River Tlingit First Nation (“TRTFN”), which participated in the provincial environmental assessment process, objected to the company’s plan to build a road through a portion of the TRTFN’s traditional territory. A project approval

certificate was granted in 1998. The TRTFN brought a petition to quash the decision on grounds based on administrative law and on its Aboriginal rights and title. The chambers judge and BC Court of Appeal found that the Province had failed to meet its duty to consult with and accommodate the TRTFN. The appeal from that decision was allowed as the Province was found to have fulfilled the requirements of its duty to consult and accommodate.

- The Crown's duty to consult and accommodate aboriginal peoples existed even prior to proof of asserted aboriginal rights and title. Grounded on the honour of the Crown, it is derived from the Crown's assertion of sovereignty in the face of prior aboriginal occupation. The duty to consult was held to vary with the circumstances. It arises when a Crown actor has knowledge, real or constructive, of the potential existence of the aboriginal right or title and contemplates conduct that might adversely affect it. This in turn may lead to a duty to accommodate aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation. The scope of the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.
- The Crown's obligation to consult the TRTFN was engaged in this case. The Province was aware of the TRTFN's title and rights claims. The decision to reopen the mine had the potential to adversely affect the substance of the TRTFN's claims. The TRTFN's claim was considered to be relatively strong, supported by a *prima facie* case, as attested to by its inclusion in the Province's treaty negotiation process.
- While the proposed road was to occupy only a small portion of the territory over which the TRTFN asserted title, the potential for negative derivative impacts on the TRTFN's claims was considered to be high. On the spectrum of consultation required by the honour of the Crown, the TRTFN was entitled to more than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that could be characterized as accommodation. The Court was unable to provide a prospective checklist of the level of consultation required in particular cases.
- The process engaged in by the Province under B.C.'s *Environmental Assessment Act* fulfilled the requirements of its duty to consult and accommodate. The TRTFN had been part of the Project Committee, participating fully in the environmental review process. Its views were put before the decision makers, and the final project approval contained measures designed to address both its immediate and its long-term concerns. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the

TRTFN. Finally, it was expected that, throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown would continue to fulfill its honourable duty to consult and, if appropriate, accommodate the TRTFN.

- See also *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 (SCC), a decision made contemporaneously.

*Do Rav Right Coalition v. Hagen*, 2005 BCSC 991 (under appeal) – see case note above re: issues raised about the environmental assessment of changes to the RAV rapid transit project from the airport to downtown Vancouver.