SIERRA LEGAL DEFENCE FUND

May 31, 2001

By fax: (867) 873 - 9593

Canadian Parks and Wilderness Society
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Attention: Greg Yeoman

Dear Sir:

Re: The interpretation of the Environmental Impact Review Board's powers under the *Mackenzie Valley Resource Management Act*

The Canadian Parks and Wilderness Society ("CPAWS") has requested an opinion from the Sierra Legal Defence Fund ("SLDF") regarding the proper interpretation of the scope of the Environmental Impact Review Board's (the "Board's") powers under the *Mackenzie Valley Resource Management Act* (the "Act"). Specifically, the interpretive question asked is:

> Is the Board's power to consider and recommend mitigation measures to ameliorate environmental impacts caused by a proposed development pursuant to s. 128 of the Act, limited to only those environmental impacts that are found by the Board to be "significant"?

The answer to this question has important implications for the administration of the scheme of the Act, and the regulation of development in the Mackenzie Valley region. In particular, if the Act is applied in such a manner as to preclude the Board from considering, and making recommendations in relation to, environmental impacts below the threshold of "significance", a potentially large loophole will have been opened up in the environmental assessment process in the Mackenzie Valley, with consequent risk to the very environmental values the Act is designed to protect.

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Based on my review of the Act, the *Mackenzie Valley Land Use Regulations* SOR/98-429 (the "Regulation") and secondary research sources, it is my opinion that the Board's powers arguably *include* the consideration of, and formulation of recommendations regarding, environmental impacts that are not found to be significant. Read as a whole, the Act confers that power on the Board by necessary implication. Furthermore, the possession and exercise of that power by the Board is consistent with the purposes and intentions of the Act, as well as the authorizing regulation governing the bodies that implement the outcome of the Board's process.

Analysis of the Board's powers under the *Act*

As a statutory tribunal, the Board draws its powers from the Act under which it is created, and the Act must be the ultimate source of authority for its actions. However, a statutory tribunal's powers are not limited solely to those powers explicitly enumerated in its empowering legislation. They also include additional powers necessarily ancillary to the proper discharge of the tribunal's functions, even if those powers are not specifically stated in the legislation.[1]

The proper interpretation of the scope of a statutory tribunal's powers therefore requires an interpretation of the power-granting provisions of the legislation that is harmonious with the scheme of the legislation as a whole, the object of the Act, and the intention of the legislature.[2] In the context of the Board, a proper interpretation of its powers also requires a consideration of the related land and water use permitting regulations that form part of the integrated review and approval process contemplated by the Act.

Beginning with the Act, the Board's powers are stated in Part 5. Section 114 states the purpose of Part 5 to be the establishment of the Board "as the main instrument in the Mackenzie Valley for the environmental assessment and environmental impact review of developments" and "to ensure that the impact on the environment of proposed developments receives careful consideration before actions are taken in connection with them".

Section 117 then specifies the matters an environmental assessment must include, stating:

> s. 117 (2) Every environmental assessment ... of a proposal for a development shall include a consideration of:
>
> (d) where the development is likely to have a significant adverse impact on the environment, the imposition of mitigative or remedial measures; and
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> (e) any other matter, such as the need for the development and any available alternatives to it, that the Review Board or any responsible minister,

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[1] MaCaulay and Sprague, *Practice and Procedure Before Administrative Tribunals* (1997), p. 29-1 to 29-5; *Re Interprovincial Pipe Line Ltd. and National Energy Board* (1977), 78 D.L.R. (3d) 401 (F.C.A.)

[2] Driedger, *Construction of Statutes* (2nd ed) as adopted by Iacobucci J. in *Re Rizzo & Rizzo Shoes Ltd.* (1998), 154 D.L.R. (4th) 193 (S.C.C.) at p. 201

after consulting with the Review Board, determines to be relevant. (emphasis added).

The combined effect of sections 114 and 117 is to constitute the Board as the primary environmental assessment authority with a broad power to consider, in the course of conducting an assessment, any matter that it determines to be relevant. This power arguably includes the power to consider environmental effects below the threshold of significance, and potential means of mitigating those effects, as such a consideration is fundamental to the discharge of the Board's primary function of being responsible for a careful assessment of proposed developments.

This conclusion is reinforced by the definition given "mitigative or remedial measure", which means a measure to control "an adverse impact of a development". The absence of the word "significant" as a qualifier preceding "adverse impact" indicates that for purposes of the Board's process, mitigative or remedial measures are not contemplated as applying only to significant adverse impacts.

The fact that s. 117(2)(d) requires the consideration of possible mitigation of significant adverse effects does not detract from or narrow the discretionary and inclusive power of s. 117(2)(e). The enumeration of a specific power in one section of an act does not fetter the exercise of a broad and purposive power under a separate provision, unless such a limiting intention is apparent on the face of the legislation[3]. No such intention is found in the Act; to the contrary, the statutory purposes informing the creation of the Board (s. 114) indicate an overarching intent to empower the Board to look at all the environmental implications of a development, including effects below the threshold of significance.

Turning to the report that is the outcome of the Board's process, s. 128(1)(c)(ii) states that, where the development is likely "to have a significant adverse impact on the environment ... [the Board may] recommend that the approval of the proposal be made subject to the imposition of such measures as it considers necessary to prevent the significant adverse effects." Section 128(2) then states that the Board shall make a report of the environmental assessment to the federal Minister and other parties.

The specific reference to mitigating significant environmental effects in s. 128(1)(c)(ii) does not preclude the Board from including in its report recommendations regarding the mitigation of environmental impacts below the threshold of significance. The language of that section does not negate the Board's otherwise broad power to consider all issues that to it appear relevant,

[3] *Northwood Inc. v. British Columbia*, [1999] B.C.J. No. 2660 (B.C.S.C.) (upheld [2001] B.C.J. No. 365); *Brown v. Surrey* (1997), 43 M.P.L.R. (2nd) 232 (B.C.S.C.); *Logan v. Canada*, [1992] F.C.J. No. 866 (F.C.T.D.)

nor does it preclude the inclusion of recommendations regarding those issues in the report.

A similar point was addressed by the B.C. Supreme Court in the *Northwood* case (previously cited). A forest company challenged the power of the provincial Forest Practices Board (the "FPB"), in the context of a report of an audit of the company's forest practices, to make recommendations regarding forest practices that, while legal, still caused environmental damage. The Court found that, while the statutory section empowering the FPB to undertake audits was on its face restricted to auditing compliance with the law, the statutory scheme as a whole clearly contemplated the FPB playing a broader role in providing recommendations to the government regarding sound forestry practices. Importantly, the Court noted that in making its audit recommendations the FPB did not exercise any decision making or permitting authority, thus reinforcing the conclusion that its power to consider and comment on relevant matters should not be unduly constrained.

The same analysis and conclusion apply here to the Board's assessment process. The Board ultimately performs a review and recommendation function, with the permitting decisions remaining in the hands of the initiating agencies. Clearly, for the Board to properly discharge its advisory function to those agencies as the "main instrument" for environmental assessments, it must have the power to consider and make recommendations regarding *all* environmental effects. To conclude otherwise would bifurcate the assessment process, where the agencies look at everything short of significant environmental effects, and the Board looks only at the significant ones. This outcome clearly frustrates the stated purpose of s. 114, as well as the preamble to the Act that sets the goal of creating an "integrated and coordinated system" of environmental management.

This conclusion is reinforced by the permitting powers granted the Land and Water Boards under the Regulation. The functions of the Land and Water Boards and the Board are intentionally integrated under the Act; the Land and Water Boards refer development proposals to the Board for assessment, and the Board provides its report and recommendations to the Land and Water Boards at the conclusion of that assessment for use in the permitting process[4].

Section 26(1) of the Regulation specifies the types of conditions that the Land and Water Boards can include in the permits that issue at the end of the assessment process, including conditions to protect wildlife and "for the protection of the biological and physical characteristics of the lands". Clearly, the power of the Land and Water Boards to impose mitigative conditions in their

[4] The Board's assessment process can be triggered by things other than a referral from the Land and Water Boards, and the Minister also plays a statutory role once the Board's report is completed. However, the scheme of the Act contemplates and entrenches this reciprocal relationship between the Land and Water Boards and the Board as a primary element of the assessment process.

permits is not restricted to only significant environmental impacts. It therefore makes no sense that the Board, which produces the report that the Land and Water Boards are expected to rely on, would be incapable of commenting on impacts that are not significant, as such a limitation would rob the Board's report of much of its purpose and utility in the permit granting process.

It is therefore my view, as stated above, that the Board's powers include the power to consider, and make recommendations regarding, environmental impacts that fall below the threshold of significance. This conclusion is based on both a close reading of the Act and associated regulations, as well as the application of principles of sound environmental assessment methodology.

I trust that the foregoing is of some assistance to CPAWS in its work, and please do not hesitate to contact me to discuss this matter further.

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Sincerely,

Timothy J. Howard
Barrister & Solicitor