

A rare species of tort in the Spray Valley: Abuse of public office

By Shaun Fluker

Cases Considered:

Genesis Land Development Corp. v. Alberta, 2009 ABQB 221

My work in environmental law began in the late 1990s as part of the opposition to a mountain resort proposed by a land company based in Calgary - Genesis Land Developers - to be located along the eastern boundary of Banff National Park in the Spray Valley. In the planning stages since the 1960s, this resort proposal had only partial regulatory approval by 1998 when its legal ownership was acquired by Genesis. The subsequent Genesis development proposal consisted of a four-season mountain resort in the Spray Valley, including a tour boat operation on Spray Lakes, helicopter and cat-assisted skiing on Tent Ridge, and a 400 bed accommodation facility. Of these three components, the boating operation was essentially approved when Genesis acquired ownership of the proposal. The regulatory approval process was in full swing until May 31, 2000, when the Government of Alberta announced the project would not be approved and the Spray Valley would be designated as a provincial park. This turn of events led to the current proceedings.

The Spray Valley is situated west of the Bow Valley alongside the continental divide of the Rocky Mountains. In comparison with the Bow Valley, there is relatively little human presence in the Spray. Small clearcuts dot the valley from several decades ago and it remains accessible via the former logging road. The valley was previously within the boundary of Banff National Park, but was removed from the park by the federal government in 1930 to facilitate the construction of a hydro-electric dam by Calgary Power. The valley is corridor habitat for bears, wolves, mountain goats, moose and the like, who avoid travelling in the Bow Valley for obvious reasons. The valley is so well-travelled by such species that the sole accommodation facility in the region - Mount Engadine Lodge - describes the area as the [Serengeti of the Rockies](#). The Spray Valley is also home to some of the best powder skiing in the Rockies, with nearby Tent Ridge being a favourite destination of mine (for a panoramic video of the Spray Valley taken while skiing on Tent Ridge in February 2009, see [here](#)).

The Spray Valley was designated as part of Kananaskis Country by the Government of Alberta in 1977. Albertans idealize Kananaskis Country as pristine wilderness. Many advocate for the Kananaskis wilderness to be preserved as an untouched place, where Albertans come to escape the rigour of daily urban life by immersing themselves in the sublime beauty and solitude of

pristine lakes, meadows, forests and glaciated peaks. This socially constructed wilderness narrative formed the core of public response to a late-1990s public survey on the future of Kananaskis. The November 1999 report included the following conclusions:

- Albertans go to Kananaskis Country instead of other mountain national parks for the location, the access, because it is less crowded and it feels more like “wilderness”;
- The diversity of recreation experience found in Kananaskis Country is important to Albertans. The preference is for activities to be compatible with the wilderness experience and the “escape to solitude”;
- Albertans view themselves as stewards of this unique area and want to promote the wilderness aspect over all others. This should take priority over recreation development;
- Albertans do not favour a blanket elimination of recreation development, but do not want any more large-scale facilities such as new four season resorts, downhill ski areas, housing developments, or golf courses. They want to know that there are strict plans to control any small-scale facilities such as new campgrounds, trails or small, backcountry lodges, because they believe that Kananaskis Country is approaching its development limit;
- Albertans like what they find in Kananaskis Country now and the policies that led to this, but want them tightened to eliminate the potential of over-development.

(See [Kananaskis Country Recreation Development Policy Review: A Consultation for All Albertans](#)).

It was within this context that the Alberta government, and the Environment Minister in particular (Gary Mar at the time), considered the Genesis proposal to construct the mountain resort in the Spray Valley. While the boating operation was essentially approved by 1999 with only ancillary permits required for operation, the skiing and resort facilities were yet to be the subject of an environmental impact assessment under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (*EPEA*), and a public hearing in front of the Natural Resources Conservation Board. Neither the environmental impact assessment nor the public hearing took place however, because on May 31, 2000 Environment Minister Gary Mar declared no approvals would be issued for the resort under his authority pursuant to section 64(1) of *EPEA* which reads:

64(1) Where the Minister is of the opinion that a proposed activity should not proceed because it is not in the public interest having regard to the purposes of this Act, the Minister may at any time by notice in writing to the proponent, with a copy to the Director, order that no approval or registration be issued in respect of the proposed activity.

Immediately following this Order (and a similar one issued under the *Water Act*, R.S.A. 2000, c. W-3) the Alberta government announced the creation of Spray Valley Provincial Park, effectively precluding any future mountain resort of the like proposed by Genesis.

My recollection is that these Orders surprised the environmental community (albeit a welcome surprise) because the Alberta government had been accommodating the Genesis proposal through the usual regulatory processes (environmental assessment and public hearings) that typically result in development approval. Also on the surprised list was Genesis itself, who subsequently commenced a civil action for damages against the Alberta government and the Environment Minister alleging abuse of public office in the issuance of Ministerial Orders that ended its Spray Valley resort proposal.

The successful tort claim for abuse of public office is a rare species that requires the claimant to establish: (1) the exercise of public authority was unlawful; (2) the public authority acted with malicious intent to injure; and (3) the claimant suffered economic damage as a result. The threshold of a successful claim is very high, and most claims fail to survive the “strike-out” phase because claimants are unable to plead sufficient facts to support the allegation (See Harry Wruck, “The Continuing Evolution of the Tort of Misfeasance in Public Office” (2008) 41 U.B.C. Law Review 69). Also contributing to its rarity is the need for a claimant that seeks an economic remedy from a public decision, rather than the more typical request that the decision be set aside. In this case, for instance, Genesis did not ask the Court to set aside the Ministerial Orders.

Genesis Land Development Corp. v. Alberta, 2009 ABQB 221, involves an application by the Alberta government and former Environment Minister Gary Mar for summary judgment to dismiss the Genesis tort claim pursuant to Rule 159 of the *Alberta Rules of Court*, Alta. Reg. 390/1968. Rule 159 entitles a defendant to summary judgment where the defendant can establish there is no merit to the plaintiff’s claim. In this case, the Alberta government argued both Crown immunity to tort liability and the absence of any evidence to support an unlawful act with respect to the Ministerial Orders.

Justice Don Manderscheid quickly rejects the assertion of full Crown immunity, citing various sources to support his conclusion that “[w]hile the government must be free to govern, it cannot do so with complete immunity” (at para. 67). The core of his judgment looks at whether the Alberta government met its onus in establishing no merit in the Genesis claim. In this regard, Manderscheid J. accepts government submissions that the Ministerial Orders were issued on the basis of public opinion (established in large part with the vocal opposition to the Genesis project and the government’s own survey referenced above), a basis that Manderscheid J. finds to be well within the discretionary authority conferred to the Environment Minister under the applicable legislation.

A key argument for Genesis was that the Ministerial Orders were not issued in response to public opinion on the Spray Valley, but rather were directed by Cabinet as a goodwill gesture to offset controversial amendments being implemented by the Alberta government to the *Alberta Health Care Insurance Act*, R.S.A. 2000, c. A-20, that now allows a physician to offer private medical services. I recall public opposition to these health care amendments far exceeded that with respect to the Spray Valley proposal, and Genesis’ argument is further supported by the fact that Gary Mar was moved from Environment Minister to the Minister of Health immediately after

announcing the creation of Spray Valley Provincial Park! None of this circumstantial argument is ultimately persuasive for Manderscheid J. who grants the government's summary judgment application to defeat the abuse of public office allegation on the basis there is no evidence of an unlawful act committed in the issuance of the Ministerial Orders. (As an aside, one portion of the Genesis claim seeking compensation for deposits paid on the boat tour operation survived the summary judgment application).

Reading this decision rekindled my curiosity as to what actually led to Environment Minister Mar's decision to terminate the Genesis resort project and designate Spray Valley Provincial Park in May 2000. While I wholeheartedly agree with the outcome, I also believe there is some truth to what Genesis alleged in this case.