

SIERRA LEGAL DEFENCE FUND

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DRAGGER FISHING

Sierra Legal challenges dragger fishing

IN LATE JANUARY, SIERRA LEGAL DEFENCE Fund's legal team was in Federal Court in Halifax challenging a decision made by the Department of Fisheries and Oceans (DFO) to allow destructive dragger fishing to take place on Georges Bank, one of Atlantic Canada's most important remaining fishing grounds.

On behalf of the Ecology Action Centre (EAC), Sierra Legal Defence Fund staff lawyers Robert Wright and Margot Venton argued in court that permitting the use of dragger fishing methods on Georges Bank is illegal because it violates provisions of the federal *Fisheries Act* that explicitly prohibit the harmful alteration, disruption or destruction of fish habitat (HADD).

"Our argument is that by allowing dragger fishing on Georges Bank, DFO has violated its own legal obligation to ensure conservation of Canadian fisheries and protection of fish habitat," said Rob Wright. Co-counsel Margot Venton added, "The HADD provisions of the *Fisheries Act* are aimed at preventing these types of destructive activities from occurring, and we hope that the Court will make DFO abide by its own rules."

Draggers catch groundfish such as cod and haddock by towing heavily weighted



Protesters march in opposition to dragger fishing before the hearing in Halifax in January. MARGO ELLEN GESSERPHOTO

nets, often weighing thousands of kilograms, across the seafloor. In the process, extensive areas of the ocean floor are scoured causing serious damage to a diverse underwater environment. A wide body of scientific research has concluded that dragger methods significantly reduce biodiversity on the ocean floor and that dragging destroys habitat required by many marine invertebrates and fish species, including the

juveniles of the species targeted by dragging.

The EAC believes dragging damages fish habitat and that DFO should encourage the use of less destructive gear and restrict draggers to less sensitive habitat. Georges Bank is one of the last productive fishing grounds in Canadian waters and has one of the few remaining viable hook and line fisheries.

"Science and common sense says that dragging damages the ocean bottom. If you destroy the habitat on which groundfish depend, then ultimately you won't have a fishing industry," says Mark Butler of the EAC. "We need to conserve habitat so that we conserve local jobs and have a sustainable fishing industry."

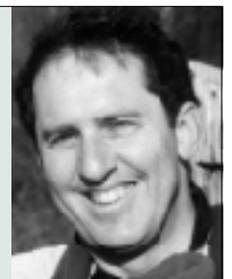
The court challenge was begun in 2001 and developed by former Sierra Legal lawyer Ray MacCallum, assisted by staff scientist Mitch Anderson. A decision is expected later in 2004.

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Sierra Legal seeks impartial offshore oil and gas panel

SIERRA LEGAL DEFENCE FUND IS RAISING concerns that two members of the Federal Public Review Panel examining the West Coast offshore oil and gas moratorium may be perceived as too closely associated with the oil and gas industry. In an opinion prepared for the Living Oceans Society, the David Suzuki Foundation and Greenpeace, staff lawyer Tim Howard reviewed information that one Panel member is a Director of a major energy company with offshore interests on the East Coast and internationally, and another pre-

viously initiated a local government campaign to lobby the government to lift the moratorium. If this information was known to the public, Howard warned, it would risk seriously undermining public faith in the impartiality of the Panel.

The moratorium on West Coast offshore oil and gas development has existed for over 30 years, and was put in place due to concerns that the environmental risks posed by oil and gas exploration outweigh the benefits. In response to pressure from the B.C. government, the

Federal Minister of Natural Resources appointed the Panel to consult with the public on whether the moratorium should be lifted. As the Panel's purpose is to solicit and consider public input and prepare a report for the Minister, public confidence in the Panel's impartiality is essential.

Living Oceans, the David Suzuki Foundation and Greenpeace have sent the Sierra Legal opinion to the Federal Ministers of Natural Resources and Environment, and the Prime Minister, and asked that the government reconsider the appointment of these two Panel members. As well, the groups are asking the government to appoint new members who represent a more balanced set of viewpoints on the issue.

AMICUS ORCA

Victory for Southern Resident orcas in U.S. Court

ON DECEMBER 17, 2003 U.S. FEDERAL COURT JUDGE ROBERT LASNIK overturned a 2002 decision by the U.S. National Marine Fisheries Service (NMFS) that found that the transboundary Southern Resident Orca whale population was not 'significant' and thus did not warrant special protection under the U.S. *Endangered Species Act* (ESA). On behalf of the Western Canada Wilderness Committee and the Georgia Straight Alliance, Sierra Legal Defence Fund joined American conservation groups in 2003 to appeal the NMFS's decision. Our submission in the appeal argued that the whales' 'endangered' status in Canada should have been considered by the NMFS when it made a decision regarding whether or not to list the whales under the ESA, since the population resides in waters of both southern British Columbia and northern Washington State. We also argued that effective conservation of transboundary species requires coordinated legally binding initiatives on both sides of the border.

In his decision, Judge Lasnik found the NMFS ignored its own scientific experts and the best available scientific information about the whales. He also found that these errors cast doubt on the correctness of the decision not to list the whales as endan-



Unless a coordinated recovery strategy is implemented on both sides of the Canada-U.S. border, the Southern Resident orca population could be extinct in as little as 30 years.

gered. His decision to overturn the NMFS's findings means that it is now possible for the Southern Resident population to receive the same higher-level protection in the U.S. as they do in Canada.

"This decision gives the NMFS no option but to listen to their scientists and list the Southern Resident orcas as an endangered species," said Margot Venton, staff lawyer for Sierra Legal. "This is also a call to action for the Canadian government. Canada will need to implement a meaningful recovery strategy along with the U.S. to protect this significant population of orcas. Otherwise these whales could face extinction in as little as 30 years."

B.C. AQUACULTURE FINES

Sierra Legal exposes fishy business in B.C. aquaculture

On behalf of the Coastal Alliance for Aquaculture Reform, Sierra Legal Defence Fund has obtained an independent investigation by British Columbia's Auditor General into the B.C. Government's decision to refund or forgive fines assessed to aquaculture companies in violation of their tenures in B.C.'s coastal waters.

Based on information contained in documents Sierra Legal obtained through the Freedom of Information Act, it appears that in 2001 and 2002 Land and Water BC (LWBC), a crown corporation responsible for managing provincial land and water tenures, returned or excused a total of \$1.5 million in fines assessed against aquaculture companies acting in non-compliance with their aquaculture tenures. According to the same documents, the decision to reimburse or not collect fines was made without ministerial approval, treasury board scrutiny or cabinet approval.

The documents show that 10 companies with 54 tenures were fined, and that while the LWBC acknowledged that the fines were consistent with policy and were routinely applied to other water tenure holders, the stated reason for the refund was that "government/industry relations may suffer" if fines were enforced. Based on a submission by Sierra Legal, the B.C. Auditor General decided on February 13 to investigate whether LWBC inappropriately forgave the penalties.

"Handing the fines back to the industry sends the wrong message," said Sierra Legal lawyer Tim Howard. "It encourages companies to knowingly violate their licences, and short-changes the taxpayer. Only an independent audit can restore public confidence in LWBC's regulation of fish farms."



Sierra Legal argued for a mandatory greenhouse gas mitigation plan at the GSX hearing.

GEORGIA STRAIGHT CROSSING

GSX review panel sets national precedent for GHG reduction

LATE LAST YEAR THE FEDERAL PANEL reviewing BC Hydro's proposed Georgia Strait Crossing, or GSX, pipeline in B.C. quietly released a second decision that has important implications for Canada's efforts to combat climate change. In approving the pipeline, the panel required Hydro to report annually on the details of a mitigation plan designed to reduce the greenhouse gas, or GHG, emissions caused by burning the gas transported in the pipeline. This is the first time in Canada that a power project has been required to take concrete steps to reduce GHG emissions, and it wouldn't have happened without Sierra Legal Defence Fund.

Sierra Legal staff lawyer Tim Howard, representing the David Suzuki Foundation and SPEC, intervened in the pipeline hearing to argue that the pipeline would create a major new source of GHG emissions that would contribute to global climate change. Given Canada's recent ratification of the Kyoto Protocol, Howard pushed for

a mandatory GHG mitigation plan, where Hydro would purchase GHG offsets to effectively cut the GHG emissions from the burned gas by 50%. An offset is a reduction in GHG emissions from another source that compensates for the increase in emissions from the pipeline gas.

"The panel's decision is a major first for Canada," said Howard. "Before we got involved, climate change wasn't even on the table in the hearing. Now we can build on this precedent in future energy project reviews."

Global climate change is one of the most pressing environmental problems on the planet, and with melting Arctic ice and wildly fluctuating weather patterns, Canada is already feeling its effects. Sierra Legal will continue to work on this issue, pressing governments and industry for concrete action to reduce GHG emissions, and arguing for a full environmental cost evaluation of major fossil fuel energy projects.

**CEC PULP AND PAPER
INVESTIGATION HITS
CLOSE TO HOME FOR**



Mark grew up beside this pulp mill in Saint John, New Brunswick. He took this photograph when he was visiting last December.

Mark Dunphy

In December 2003, the Commission for Environmental Cooperation (CEC), an international watchdog agency created under NAFTA's environmental side agreement, announced that it would commence an international investigation into Canada's lax enforcement of anti-pollution laws against a number of pulp mills in Ontario, Quebec and the Atlantic provinces. The announcement came as a result of a complaint submitted to the CEC by Sierra Legal Defence Fund counsel Rob Wright on behalf of a coalition of environmental groups in 2002.

STAFF PROFILE

For one of Sierra Legal's staff members, the investigation hits close to home, literally. Sierra Legal's accountant, Mark Dunphy, grew up in Saint John, New Brunswick, approximately one mile away from one of the ten mills the CEC will highlight in its investigation.



Mark with his wife Carol and son Michael.

As a child, Mark had bad allergies and was painfully aware of air pollution emitted by the mill. He recalls walking home from school and not being able to stop coughing on days when the air quality was especially bad. Asked whether he would raise a family in the same neighbourhood where he grew up, Mark says firmly, "Absolutely not. I would choose to live in Saint John, but I wouldn't want to live so close to the mill."

Mark now lives in Vancouver, but goes home to Saint John often, and says the community is still concerned about effluent from the mill that continues to regularly pour into the Saint John River. Last summer, Mark was planning to swim across the Saint John River downstream from the pulp mill, but instead decided to swim upstream because of the ever-present effluent from the mill.

Mark, an avid photographer and "outdoors person," has worked at Sierra Legal for over five years. One day in 1998, while Mark was home in New Brunswick, his wife spotted a posting for an accountant at Sierra Legal.

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Will the *Species At Risk Act* really protect Canada's endangered species?

IN DECEMBER 2002, TEN YEARS AFTER RATIFYING the Convention on Biodiversity, Canada finally passed its *Species At Risk Act* (SARA). Despite the federal government's efforts to characterize SARA as addressing the widely documented decline of species across Canada, the legislation narrowly defines the federal government's jurisdiction over species, and leaves the primary role for species and habitat protection in Canada to the provinces and territories. The end result is a law that protects a mere 5% of Canada's lands outside the territories. Unfortunately, SARA simply doesn't do what it purports to do – protect Canada's endangered species.

The federal government defends SARA by saying that it will work with provincial and territorial governments to ensure species are protected and, failing that, will use discretionary measures that exist within the Act to protect provincial species. But these kind of discretionary measures exist in many other Acts and are rarely used.

Because SARA has such a narrow jurisdiction, endangered species will rely on provincial laws for protection. But in provinces



B.C.'s Spotted Owl is one of Canada's most endangered birds, yet logging continues in its habitat. SHARON TOOCHIN PHOTO

like British Columbia that have no provincial endangered species legislation, that means that species and their habitat come last. Consider B.C.'s Spotted Owl. Due to logging of its habitat, the Spotted Owl has become one of Canada's most endangered birds, and recent surveys indicate that less than 50 birds remain in B.C. Yet the province continues to approve logging in critical Spotted Owl habitat.

Sierra Legal defends the rights of endangered species through strategic litigation and law reform, and we'll keep up that fight. While SARA clearly falls short of its potential, our staff lawyers are currently working with scientists to examine how the Act can be used to address those species most desperately in need of help. We'll keep you posted on that work in future newsletters.

Sierra Legal Defence Fund staff lawyers Devon Page and Margot Venton will present at the *Species at Risk 2004* conference in Victoria in March.

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"I thought there must be a thousand people out there who would want this job. It means a lot to me to work with an organization that reflects my personal values and is open to my opinions; it makes my job meaningful." And although he is not on Sierra Legal's "front line" of litigation or scientific investigation, Mark feels he is able to contribute by ensuring that Sierra Legal keeps administration costs down. "My job is to make sure we are using our financial resources wisely. I always keep in mind that the smallest donation is as important as the largest, and I believe that all of Sierra Legal's operations should reflect this."

Mark feels that the CEC's investigation is a very positive step for the residents of Saint John. "Finally someone from the outside is looking at this issue. We have always felt somewhat helpless in getting the mill to comply with our reasonable expectations of clean air and water. Hopefully the CEC's investigation will empower our community to stand up to the company and force the mill to finally clean up its act."

Toronto pesticide bylaw battle continues

In December 2003, the Ontario Superior Court dismissed CropLife Canada's application to strike down the City of Toronto's by-law to restrict the cosmetic use of pesticides within the City. Sierra Legal Defence Fund successfully intervened in the case on behalf of World Wildlife Fund Canada and the Federation of Canadian Municipalities, arguing that municipalities have the power to protect residents from the risks of pesticides. Unfortunately, CropLife, an industry body that represents the manufacturers of pesticide products, has subsequently appealed the decision to the Ontario Court of Appeal. Sierra Legal will again seek to participate in the appeal on behalf of the same interveners and the major legal issue will once again relate to the jurisdiction of municipalities to enact pesticide by-laws under the new Ontario *Municipal Act*. "We continue to try to uphold the right of local governments to respond to calls for better health and environmental protection," said Sierra Legal's Managing Lawyer, Jerry DeMarco. The appeal is expected to be heard later this year.

ON THE BOOKS

Updates on Sierra Legal
Defence Fund Cases

KINGSTON HEARING FOCUSES ON FISHERIES ACT

Sierra Legal Defence Fund was in the Ontario Court of Appeal in December appealing a lower court decision that directed a new trial regarding the landmark private prosecution of the City of Kingston. Sierra Legal's Doug Chapman, on behalf of a private informant, and the Ontario Ministry of the Environment (MOE) successfully prosecuted the City under the federal *Fisheries Act* in 1999 for illegally discharging toxic effluent into the Cataraqui River. In June 2002, these convictions were set aside and a new trial was ordered on the legal issue as to the applicable legal test under the pollution prevention section of the Act. Sierra Legal and the MOE appealed this decision and at the recent hearing, Sierra Legal counsel Rob Wright argued that the trial Justice applied the correct legal test and the original convictions should be restored. It is expected that the outcome of the case will have implications across the country, as the federal *Fisheries Act* is one of the strongest pieces of environmental legislation in Canada. We expect a decision later this year.

TRUENORTH OIL SANDS CHALLENGE

Sierra Legal Defence Fund expects to be in court in 2004 on the Truenorth oil sands case. Acting for three Alberta clients, staff lawyers Tim Howard and Randy Christensen are challenging the Department of Fisheries and Oceans' inadequate environmental assessment of a major oil sands project near Fort McMurray, Alberta. Despite the fact that the oil sands mine and processing facility will destroy critical migratory bird habitat, produce large volumes of greenhouse gas emissions and contribute to contamination of fish in the Athabasca River and transboundary air pollution, the Department is limiting the scope

of its assessment to one small creek that will be destroyed by the mine construction. Arguments have been filed in the case, and we are now waiting for a court date.

INVESTIGATION RECOMMENDED INTO BIRD HABITAT DESTRUCTION

On behalf of eight environmental groups from Canada and the United States, Sierra Legal Defence Fund lawyers Albert Koehl and Jerry DeMarco filed a complaint with the North American Commission for Environmental Cooperation (CEC) in February 2002 regarding Canada's failure to protect migratory birds at their nesting sites as required by the international *Migratory Birds Convention Act*. Our research

(by two-thirds vote) as to whether the investigation is to proceed and factual record is to be prepared.

GRIZZLY BEAR HUNTING DATA APPEAL

Sierra Legal Defence Fund was in the British Columbia Court of Appeal in January in an attempt to ensure that grizzly bear kill site data is made available to the public. Representing the Raincoast Conservation Society, Sierra Legal is defending the provincial Information and Privacy Commissioner's 2002 ruling that the government has to disclose data showing the local area where grizzly bears are killed by hunters. This data is critical to Raincoast's efforts to prepare an independent assess-



Sierra Legal fights on for public access to B.C. grizzly bear kill data.

revealed that clear-cut logging operations in Ontario alone destroy tens of thousands of nests annually. After being required by the CEC Council to provide additional information on specific forestry harvesting data, we were pleased that in December 2003, the CEC Secretariat once again recommended that an international investigation be launched and a factual record be prepared. We continue to champion the submission, and it is our hope that this action will set a precedent to help better protect migratory birds from large-scale clear-cutting across the country. The CEC Council, comprised of the three Environment Ministers from Canada, the U.S. and Mexico, must now make a determination

of the impact of sport hunting on grizzly bear distribution and population in B.C.

B.C.'s ministry of Water, Land and Air Protection and the B.C. Guide Outfitters Association of B.C. challenged the Commissioner's 2002 decision in court, ironically claiming that releasing data about the bears that the government permits outfitters to kill every year would interfere with the conservation of the grizzly population. Last year, the B.C. Supreme Court ruled in favour of the Commissioner's findings that releasing the data posed no conservation concern, prompting an appeal by the Guide Outfitters. The decision is expected shortly.

Empowering Canada's environmental movement



Robert Mitchell

WHILE I WAS IN HALIFAX RECENTLY, spending time with the staff and volunteers at the Ecology Action Centre – our clients in the Dragger case – I had the opportunity to reflect on the unique role Sierra Legal Defence Fund plays among Canadian environmental groups. Over and over again I was told how Sierra Legal's involvement in the case had em-

powered the EAC by galvanizing local opposition to this dreadful method of fishing and enabling them to take their campaign to the next level.

From Sierra Legal's point of view, we have taken this case to the federal court and we are awaiting a decision. And although our direct involvement in the case has come to an end for the time being, the Ecology Action Centre will continue to fight dragger fishing off Georges Bank; and now this fight will be at a higher level. As a result of the national attention this case has received, the profile of this critical issue and the organization that is championing it have been raised significantly. This is what Sierra Legal Defence Fund does.

Our founding Executive Director, Greg McDade once said, "whether or not we win cases, more often than not our clients in the environmental movement win issues." We support environmental organizations and their campaigns, and give

them a stronger voice so that their issues are taken more seriously. Even in those cases we might not take on, our very existence is considered a threat by those who participate in activities that degrade the environment and threaten public health. In many instances, because of our proven track record in bringing a great deal of attention to issues we become involved with, governments and industry are more likely to make decisions that won't invite legal challenges and, as a result, are better for the environment.

When we collaborate with other environmental organizations our effect is exponential, and this collaboration acts as a catalyst for change. Although this was particularly evident to me in Halifax last month, we experience this sort of empowerment all the time: whether with the Ecology Action Centre, the World Wildlife Fund, Friends of the Earth, Sierra Club, the Western Canada Wilderness Committee, the David Suzuki Foundation or any of the dozens of environmental groups we are proud to serve.

I would also like to express that it is you, our donors, who empower Sierra Legal Defence Fund and make all this possible. I thank you for providing the support that allows Sierra Legal to continue to enforce and strengthen environmental laws in Canada, and help other environmental organizations across Canada fight for environmental justice.

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THE SIERRA LEGAL DEFENCE FUND is a Canadian charity (BN 13474 8474 RR0001) providing free legal services to environmentalists in Canada. We are completely separate from the Sierra Club.

For details, visit our website at www.sierralegal.org

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DONOR PROFILE | PHYLLIS MALONE

An inspirational supporter

Phyllis Malone has spent most of her life in the small towns of British Columbia's interior and Vancouver Island, where the vast forests and intimate surrounding of B.C.'s natural world showed her the value and richness that the environment holds.

"Among my happiest memories are times just sitting on a log in the forest surrounded by trees and forest undergrowth. Our forests are priceless."

Phyllis has devoted a great deal of time to enjoying the natural world through activities like hiking and walking, and she feels that Sierra Legal's integrity as an organization has made a huge impact in protecting the environment. In December, Phyllis sent us a letter expressing her feelings about our work, and our recent landmark Supreme Court of Canada victory over Imperial Oil.



Phyllis considers Canada's forests "priceless."

"I can't tell you how proud I am of Sierra Legal's unparalleled lawyers. I have joined a number of what I considered worthwhile causes over my lengthy lifetime – eighty years – but I don't recall such a satisfying victory before. My congratulations to all concerned."

A dedicated Sierra Legal Defence Fund supporter since 1992, Phyllis has not only expressed her gratitude for our work, she has inspired us to continue working hard for future victories.



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For more information about leaving a gift in your will, please contact Carol McDonald at 1-800-926-7744 ext. 250, or email her at cmcdonald@sierralegal.org.