

ALBERTA ENVIRONMENTAL APPEAL BOARD DECISION

Preliminary Meeting: October 16, 1997

Date of Decision: October 30, 1997

IN THE MATTER OF Sections 84, 85, 86 and 87 of the
Environmental Protection and Enhancement Act, (S.A. 1992, ch. E-
13.3 as amended);

- and -

IN THE MATTER OF an appeal filed by Allan Johnstone with
respect to Approval No. 113-01-00 issued by the Acting Director, Air
and Water Approvals Division, Alberta Environmental Protection to
Weyerhaeuser Canada Ltd.

Cite as: Johnstone v. Acting Director of Air and Water Approvals Division, Alberta
Environmental Protection.

PRELIMINARY MEETING BEFORE Dr. M. Anne Naeth, Panel Chair
Dr. Ted W. Best
Mr. Ron V. Peiluck

APPEARANCES

Appellant	Mr. Allan Johnstone; Mr. W. Gray Jones of Western Canada Wilderness Committee attending with Mr. Johnstone
Other Parties	Mr. Larry Begoray, Ms. Elaine Wasylenchuk, Alberta Environmental Protection, represented by Mr. Gilbert Van Nes Weyerhaeuser Canada Ltd., represented by Ms. Anne Giardini and Mr. Ed Lamy

BACKGROUND

On June 26, 1997 and effective July 1, 1997, the Acting Director of Air and Water Approvals Division, Alberta Environmental Protection (Director) issued Approval 113-01-00 (Approval) to Weyerhaeuser Canada Ltd. for the operation and reclamation of a pulp manufacturing plant, a Class II water treatment plant, a sawmill, a planermill and woodroom, and construction of an industrial landfill at the plant.

On August 11, 1997, Mr. Allan Johnstone of Northern Enviro Network (the Appellant), filed an appeal of the Approval with the Environmental Appeal Board (Board).

The Board advised the Director and Weyerhaeuser Canada Ltd. that the Approval had been appealed, and asked for copies of all related correspondence, documents and materials. On October 2, 1997, the documents received from the Department were forwarded to the Appellant and to Weyerhaeuser Canada Ltd.

On September 23, 1997, the Board wrote to the Natural Resources Conservation Board (NRCB), and

the Alberta Energy and Utilities Board (AEUB) asking whether the matter was the subject of a public hearing or review under their Boards.

Responses were received on September 29, 1997 from the AEUB and October 14, 1997 from the NRCB advising that the matter had not been the subject of a review or hearing under their Boards.

On October 10, 1997, Dr. Naeth requested the Board write to all parties and ask if they felt there could be a perceived conflict with her chairing the preliminary meeting as she currently receives research funding from Weyerhaeuser for two projects at the University of Alberta. All parties responded in writing that they did not perceive a conflict of interest.

On October 14, 1997, the Board advised all parties that a preliminary meeting would be held on October 16, 1997, at the Board's office in Edmonton.

THE PRELIMINARY MEETING

The Board held a preliminary meeting on October 16, 1997. The purpose of this preliminary meeting was to deal with the directly affected issue as contemplated by section 84 of the *Environmental Protection and Enhancement Act* (Act), and to determine if the appeal will proceed to a hearing.

SUBMISSIONS BY THE PARTIES

On October 15, 1997, the Department advised the Board, in a letter dated October 14, 1997, they intended to make application to the Board to dismiss the appeal. The grounds noted were as follows:

- (a) the notice of appeal discloses no grounds of appeal that are within the jurisdiction of the Board;

- (b) the Appellant is not directly affected, and
- (c) the notice of appeal was filed out of time.

In Mr. Van Nes' letter he writes¹:

“The main concern of [sic] Director is that the notice of appeal discloses no grounds of appeal that are within the jurisdiction of the Board. As a result, the notice of appeal is frivolous and vexatious. We have reviewed the various submissions of the Appellant, and note that it is very difficult to identify what specific concerns the Appellant wishes to raise. ...

... In support of the application by the Director to have this appeal dismissed on the ground that it is beyond the jurisdiction of the Board, we direct the Board's attention to the case of *Fred J. Wessley v. Director, Alberta Environmental Protection* (Appeal No. 94-001).

The second ground used to support the application to have this appeal dismissed is that the Appellant is not directly affected. There is no evidence in the submissions of the Appellant that he is directly affected - either by geographical proximity or by having an interest above and beyond that of the general public. The Appellant has the onus to prove that he is directly affected. In support of this position, we direct the Board's attention to the cases of *Maurice Boucher v. Director, Alberta Environmental Protection* (Appeal No. 93-004) and *Lucey v. Acting Director of Land Reclamation, Alberta Environmental Protection* (Appeal No. 97-033).

The third ground uses [sic] to support the application to have this appeal dismissed is that the notice of appeal is filed out of time. ...”

On October 15, 1997, Weyerhaeuser Canada Ltd. advised the Board they intend to make application to the Board to dismiss the appeal stating the following as grounds for dismissal:

“The Environmental Appeal Board has stated in earlier decisions that if a person has not filed a statement of concern or is not directly affected then the person does not have standing to file a notice of objection and their appeal will not proceed to a

¹ Letter of October 14, 1997, from Gilbert Van Nes, Alberta Justice, to the Alberta Environmental Appeal Board.

hearing: *Lucey v. Director of Land Reclamation, Alberta Environmental Protection*, May 32 [sic], 1997 Appeal No. 97-003; *Selma Kelm v. Director of Air and Water Approvals Division, Alberta Environmental Protection*, May 13, 1997 Appeal No. 97-

002; *Lucey #2 v. Director, Air and Water Approvals*, October 15, 1996 Appeal No. 96-072; *Dr. Martha Kostuch v. The Director of Air and Water Approvals Division*, August 23, 1995 Appeal No. 94-017.”

Mr. Johnstone, with his August 11, 1997, notice of appeal, filed a number of documents which requested criminal investigation for political bribery, fraud and misconduct of office, alleged conspiracy and outlined various incidents some of which were related to the subject mill. He attempted to establish in this material how he was directly affected by the Approval.

During Mr. Johnstone’s oral submission he submitted as evidence a World Wildlife Fund video² with disruptive impact of herbicides and pesticides on the endocrine system. He outlined how he and his family had been severely impacted by his environmental advocacy such as his inability to find employment, community antagonism towards him and inability to obtain community support for his environmental concerns. He indicated this also affected his wife’s employment and his personal relationship in his marriage. He noted a number of environmental and other related concerns such as the cumulative effects of PCBs and dioxins, lack of forensic environmental audits, no requirements to improve water quality during the life of the permit even if technology had been improved. He noted concerns about the approval process such as its inadequate notice of meetings and Approvals. During questioning by the Board, Mr. Johnstone stated that his residence was 25 miles west of Grande Prairie. His children attended the local school at Beaverlodge, his wife taught school at a location 10 miles outside Grande Prairie and he went to Grande Prairie about 3 times a week.

The Department and Weyerhaeuser made brief oral submissions basically summarizing their written submissions and indicating the Appellant was not directly affected.

² Exhibit 1: Video Tape “Hormone Copycats”.

CONSIDERATIONS OF THE BOARD

Directly Affected

There is no simple test to determine whether a person is directly affected within section 84 of the Act. This Board has stated in *Fred J. Wessley v. Director of Environmental Protection*³, this determination must be made on a case by case basis, taking into account the particular facts and circumstances of each appeal. In *Dr. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*⁴, the Board reviewed the principles and authorities concerning the meaning of “directly affected”. The Board stated that the word “directly” requires an appellant to establish that a direct personal or private interest of an economic, environmental or other nature is likely to be impacted or caused proximately by the Approval in question. The impact or proximate cause on the appellant must be greater than on the general public. Generalized concerns or grievances will not be sufficient. The Board concluded its analysis by stating:

“Two ideas emerge from this analysis about standing. First, the possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. This first issue is a question of fact, i.e., the extent of the causal connection between the approval and how much it affects a person’s interest. This is an important point; the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernible effect, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. “Directly” means the person claiming to be “affected” must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.

Second, a person will be more readily found to be “directly affected” if the interest in question relates to one of the policies underlying the Act. This second issue raises a

³ Appeal No. 94-001, February 2, 1994.

⁴ (1995), 17 C.E.L.R. (NS) 246.

question of law, i.e., whether the person’s interest is supported by the statute in question. The Act requires an appropriate balance between a broad range of interests, primarily environmental and economic.”⁵

The first paragraph of the passage was quoted with approval by Marceau J. in a judicial review application⁶ brought to challenge the Board’s decision on “directly affected” in the *Dr. Martha Kostuch* appeal. The court was satisfied that the Board applied the correct test⁷ and dismissed the application.

The Board’s interpretation of “directly affected” was influenced by the January 1996 decisions of the Alberta Court of Appeal in *CUPE Loc. 30 et al. v. W.M.I. Waste Management of Canada Inc.*⁸; and *Friends of the Athabasca Environmental Association et al. v. Public Health Advisory and Appeal Board.*⁹ In these cases, the court considered the meaning of s. 4(2) of the Alberta Public Health Act which gives a person who is “directly affected” by a decision of a local board of health, the right to appeal to the Public Health Advisory and Appeal Board. In the W.M.I. case, the court stated:

“The phrase ‘directly affected’ must mean something more than “affected”. However, it cannot be given an expanded meaning simply by virtue of expanding social consciousness: *Canada (A.G.) v. Mossop* (1993) 100 DLR (4th) 658 (SCC).

In our view, the inclusion of the word “directly” signals a legislative intent to further circumscribe a right of appeal. When considered in the context of the regulatory scheme, it is apparent that the right of appeal is confined to persons having a personal rather than a community interest in the matter.”¹⁰

⁵ *Ibid.*, at p. 257.

⁶ *Kostuch v. Alberta Environmental Appeal Board*, Alberta Queen’s Bench, Action No. 9503-19741, March 28, 1996.

⁷ *Ibid.*, at p.11.

⁸ Appeal No. 9403-0228-AC.

⁹ Appeal No. 9403-0365-AC.

¹⁰ *Ibid.*, at p. 8.

Further, in both cases the Court of Appeal rejected the view that notwithstanding the words “directly affected”, standing to appeal could be based on the principles of discretionary public interest standing that were outlined by the Federal Court in *Friends of the Island v. Canada (Minister of Public Works)*.¹¹ In the *Friends of the Athabasca* case, the Court of Appeal stated:

“The Appellants urge the application of the principle in *Friends of the Island*, which held that courts have a broad discretion to grant standing to apply for judicial review. We specifically rejected that proposition in *W.M.I. Waste Management*. The mandate of an administrative tribunal and its legal process must be construed in accordance with the legislative intent. In our view, that intent is clear. The use of the modifier “directly” with the word “affected” indicates an intent on the part of the Legislature to distinguish between persons directly affected and indirectly affected. An interpretation that would include any person who has a genuine interest would render the word “directly” meaningless, thus violating fundamental principles of statutory interpretation: *Subilomar Properties (Dundas) Ltd. v. Cloverdale Shopping Centre Ltd.* (1973) 35 DLR (d) 1 (SCC) at 5. An interpretation that would import expanding concepts of judicial discretion, contrary to the intention of the Legislature, would engage the sort of interpretive exercise expressly rejected by the Supreme Court in *Canada (Attorney-General) v. Mossop* (1993) 100 DLR (4th) 658 at 673.”¹²

Persons who file notices of objection bear the onus of establishing that they are directly affected by the application.¹³ However, in *Hazeldean Community League and Two Citizens of Edmonton v. Director of Air and Water Approvals, Alberta Environmental Protection*,¹⁴ the Board found it important to note, that in *special* circumstances this onus may be discharged without proof of direct causation.

The Board’s task is to determine at this preliminary stage of the proceeding whether, on a balance of probabilities, there is a potential, that is, a reasonable possibility, that the Appellant is directly

¹¹ (1993), 102 D.L.R. (4th) 696 (F.C.T.D.).

¹² *Ibid.*, at p. 4.

¹³ Environmental Appeal Board, Rules of Practice, No. 29, Burden of Proof, at p. 13.

¹⁴ Decision Report (May 11, 1995) EAB Appeal No. 95-002 at p.4 (Alta. EAB).

affected by the application.

The Board must keep in mind that for a non-approval holder to have standing to appeal to this Board, he/she must be *directly* affected by the decision made by the Director and by the specific activity approved by the Director.

To be directly affected under section 84(1)(a)(v), this Board believes the person who appeals must have a substantial interest in the outcome of the approval that surpasses the common interests of all residents who are affected by the approval (see the Board's earlier decision in *Maurice Boucher v. Director, Alberta Environmental Protection*). "Directly affected" depends upon the chain of causality between the specific activity approved (the pulp mill) and the environmental effect (e.g. air emissions or pulp effluent) upon the person who seeks to appeal the decision.

Mr. Johnstone outlined a number of environmental and approval process concerns as well as numerous other matters outside the Board's jurisdiction such as social justice and the political system. He showed a long term interest in the communities environmental matters. However, he failed to establish that he was directly affected by the Approval and that he had substantial interests in the outcome of the Approval over and above the interests of the general public. The facts underlying Mr. Johnstone's appeal failed to establish a causal connection to the pulp mill and associated effects on him.

FILING TIME

As indicated by the submissions of the Department of Environmental Protection, Mr. Johnstone received notification by mail from the Department in their letter dated June 27, 1997. The burden of proof on all issues is upon the appellant. Mr. Johnstone advised the Board that he did not receive a copy of the Approval from the Department and only received notification regarding this project through the Grande Prairie Herald. Notwithstanding, if Mr. Johnstone had received the June 27, 1997 notice, and allowing for the 7 days, then extend the time limitation by 30 days by the Act, this

brings the final filing date required of this appeal to August 3, 1997. Mr. Johnstone's appeal was filed with the Board on August 11, 1997. The Board accepts that Mr. Johnstone was aware of this Approval on or near the date indicated by the Department. According to the *Interpretation Act*¹⁵, 7 days are allowed to encompass postal difficulties. The Board believes Mr. Johnstone was aware of the Approval on or near the date implied by the Department, making his filing 8 days late. Therefore, the Board notes this delay, and does not feel obligated to extend the date for filing, nor was a formal request made to do so.

DECISION

The Board dismisses Mr. Johnstone's appeal as he is not directly affected by the Acting Director's decision to issue the Approval. Therefore, the Board does not have jurisdiction to hear this appeal. In reaching this decision, the Board has carefully considered all of the submissions filed by all of the parties, whether or not their evidence was specifically referred to herein.

Additionally, the Board rules that Mr. Johnstone's notice of appeal was filed out of time without sufficient or any reason to grant an extension.

Dated on October 30, 1997, at Edmonton, Alberta.

Dr. M. Anne Naeth, Panel Chair

Dr. Ted W. Best

¹⁵ S.A. 1980, ch. I-7 as amended.

Mr. Ron V. Peiluck