

ALBERTA  
ENVIRONMENTAL APPEAL BOARD  
  
DECISION

Preliminary Meeting: October 23, 1997  
Date of Decision: November 13, 1997

**IN THE MATTER OF** Sections 84, 85, 86, 87, 90 and 91 of the Environmental Protection and Enhancement Act, (S.A. 1992, ch. E-13.3 as amended);

- and -

**IN THE MATTER OF** appeals filed by Fay Ash and Don Munroe with respect to Approval No.'s 18445-01 issued to the City of Calgary, Calgary Parks and Recreation and 47150 issued to the City of Calgary, Golf Course Operations # 136 by the Director, Southern East Slopes and Prairie Regions, Environmental Regulatory Service, Alberta Environmental Protection.

Cite as: Ash and Munroe v. Director of Southern East Slopes and Prairie Regions, Environmental Regulatory Service, Alberta Environmental Protection.

**PRELIMINARY MEETING BEFORE**

Dr. William A. Tilleman, Chair  
Dr. Ted W. Best  
Mr. Ron V. Peiluck

**APPEARANCES**

Appellants

Mr. Don Munroe represented by Mr. David Swann  
and Ms. Fay Ash represented by Mr. David Crowe

Other Parties

Ms. Charlene Graham representing the Director,  
Southern East Slopes and Prairie Regions,  
Environmental Regulatory Service, Alberta  
Environmental Protection, and Mr. Rob Burland,  
Approval Coordinator, Alberta Environmental  
Protection

City of Calgary Parks and Recreation represented by  
Mr. Timothy Haufe, and Mr. Todd Reichardt

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## **FINDINGS OF FACT**

### **I. BACKGROUND**

[1] On July 25, 1997, the Director of Southern East Slopes and Prairie Regions, Environmental Regulatory Service, Alberta Environmental Protection (the Director) issued Approval No.'s 18445-01 and 47150 (Approvals) to the City of Calgary, Calgary Parks and Recreation (18445-01) and Golf Course Operations # 136 (47150) for the application of pesticide within 30 horizontal metres of an "open body of water".

[2] On August 11, 1997, Mr. Don Munroe and Ms. Fay Ash (the Appellants), each filed appeals with the Environmental Appeal Board (the Board).

[3] The Board advised the Director and Mr. Todd Reichardt of the City of Calgary, Parks and Recreation, that the Approvals had been appealed, and requested copies of all related correspondence, documents and materials from the Department of Environmental Protection (the Department). On August 29, 1997, the documents received from the Department were forwarded to the Appellants and to the City of Calgary.

### **II. THE PRELIMINARY MEETING**

[4] The Board held a preliminary meeting on October 23, 1997, to deal with the directly affected issue as contemplated by section 84 of the *Environmental Protection and Enhancement Act* (Act), and the jurisdiction of the Board to hear the issues raised by the Appellants and, accordingly, whether or not the Board should proceed to a hearing.

### III. SUBMISSIONS BY THE PARTIES

#### A. Ms. Ash

[5] In addition to their written submissions, Ms. Ash and Mr. Munroe responded orally on October 23, 1997, to the question of directly affected and the jurisdiction of the Board to hear the matters raised by the Appellants in their Notices of Objection.

[6] Mr. Crowe, representing Ms. Ash, argued that the *Environmental Protection and Enhancement Act* gives the Board jurisdiction to deal with the issues raised by Ms. Ash<sup>1</sup>, and that the City of Calgary's pesticide notice invited persons such as Ms. Ash to make application to the Board. With regard to the directly affected issue, Mr. Crowe took issue with the Department's position that the Approvals are very specific in nature, saying instead that the Approvals are very general in nature, allowing the application of pesticides within 30m of the watercourses in Calgary. He pointed out that the Approvals are for a five year period, making it impossible to predict when and where spraying will occur.

[7] Ms. Ash gave evidence that as an artist and educator, she paints on location, off paths and everywhere along the river systems in the City of Calgary. She takes students to areas along the Bow River to sketch on location. She is deeply concerned about her activities in sprayed areas not properly signed. Ms. Ash also explained to the Board how the City of Calgary's decision to spray around water bodies causes stress to her health.

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<sup>1</sup> Notice of Appeal, Ms. Fay Ash, dated August 10, 1997, wherein Ms. Ash raised the following issues: fungicide use on golf courses, golf course licenses, expiry date of approval, city pest management plan, signage, water quality, reduction in pesticide use, education, community involvement, wildlife sanctuary, and "inert" ingredients.

[8] Ms. Ash alleges that when she canoes on the Bow River she disembarks randomly, causing her an increased risk of contact with pesticides, particularly given the inadequate signage marking sprayed areas. When asked by the Board whether she could be more specific, Ms. Ash responded by saying that “if a site is of interest to me ... , I cannot be assured that I will not stumble into these areas.” She stated that she is in these areas very frequently, four times a week or more and certainly within 30 metres of the shore. When asked by the Board how often in the past year she had walked through sprayed areas, Ms. Fay said she had three such experiences in the past year. In one incident, the sign had fallen over, and she saw it after she had been in the area.

[9] Mr. Crowe rebutted the City of Calgary and Alberta Environmental Protection’s submission that the Appellants concerns are frivolous, by giving evidence of adverse effects of pesticides, pesticide residues and inert ingredients on humans. Mr. Crowe submitted a series of articles from Rachel’s Environmental and Health Weekly<sup>2</sup> that describe the effects of chemicals on human and environmental health. Mr. Crowe argued that the overwhelming evidence of toxic dangers associated with pesticide use means that Ms. Ash’s appeal, at least, is not frivolous.

**B. Mr. Munroe**

[10] Mr. Swann, representing Mr. Munroe, gave evidence that there are many trails and pathways located within 30 metres of Calgary’s waterways, that Mr. Munroe uses the areas around the Bow River and other waterways, that the actual locations for pesticide spraying are not set out in detail in the Approvals, and that the extensive period set out for the Approvals means that Mr. Munroe will very likely be affected by the pesticide spraying allowed under the Approvals.

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<sup>2</sup> Exhibit No. 4: Articles - A collection of articles from Rachel’s Environment and Health Weekly - 1994 to 1997.

[11] When asked by the Board to comment on how he is directly affected, Mr. Munroe responded by saying that the Approvals are contrary to the City of Calgary's proposed Integrated Pest Management Plan (IPMP).<sup>3</sup> He also expressed concern that the fundamental issue is whether to give Parks and Recreation targets for reduction of pesticide use.

### **C. The Director**

[12] Ms. Charlene Graham, counsel for the Director, submitted a map of the City of Calgary identifying the locations where the Appellants live and the areas sprayed with pesticides this year.<sup>4</sup> The Director took the position that many of the Appellants' concerns as set out or attached to their Notices of Appeal relate to the agreement between the City of Calgary and themselves, arguing that these concerns have nothing to do with the actual Approvals.

[13] With regard to the issue of directly affected, Ms. Graham argued that the Board should follow its directly affected decisions set out in *Dr. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*<sup>5</sup> and more recently in *Selma Kelm v. Director of Air and Water Approvals Division, Alberta Environmental Protection*.<sup>6</sup> In other words, she argued that the Board must be convinced on a balance of probabilities that the Appellants have a direct personal or private interest of an economic or environmental nature, that is affected by the specific Approval, the specific activity approved, and that the Appellants have a substantial interest in the outcome of the Approval.

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<sup>3</sup> Exhibit No. 7: Integrated Pest Management Plan dated September 1997.

<sup>4</sup> Exhibit No. 5: Map of City of Calgary.

<sup>5</sup> (1995), 17 C.E.L.R. (N.S.) 246 (Alta. E.A.B., August 3, 1995) [hereinafter *Kostuch*].

<sup>6</sup> Appeal No. 97-002, May 13, 1997 [hereinafter *Kelm*].

[14] According to the Director, to be directly affected, factually, the Appellants must be present during spraying or shortly thereafter, and to do so, the person must not see the signs and go off trails. To make this point, Ms. Graham relied on the Board's *Kelm* decision to argue that the effects for the Appellants are here, as in *Kelm*, no greater than for any other Calgarians walking in the area.

[15] When asked by the Board how the Director evaluated impacts on wildlife at the Inglewood Bird Sanctuary, Ms. Graham said that staff at the Sanctuary had been directly contacted by the Director and that the staff said there were no impacts.

**D. City of Calgary**

[16] Mr. Timothy Haufe submitted copies of the proposed Integrated Pest Management Plan.<sup>7</sup> On the issue of directly affected, Mr. Haufe argued that neither Appellant is affected more than other citizens of Calgary, and that neither Appellant is directly affected. The City of Calgary submitted, in error we note, that the Board was not free to evaluate all of the Director's Approval, and therefore that a number of the Appellants' environmental concerns were not redressable by the Board.<sup>8</sup> Mr. Haufe also argued that the Appellants' appeals were frivolous or without merit, not with regard to the validity of the issues raised, but with regard to whether they were properly before the Board.

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<sup>7</sup> *Supra*, note 3.

<sup>8</sup> Section 87(2) of the Act makes clear the scope of inquiry into a Director's decision, including compliance with section 65 of the Act and whether there is new information available to the Director at the hearing that was not available previously. See also *Gulf Canada Resources Limited v. The Minister of Environmental Protection and Environmental Appeal Board*, Action No. 9601 00113, April 25, 1996 (Alta. Q.B.).



#### **IV ISSUES**

[17] The Board identifies the following preliminary issues in this appeal:

1. Are the Appellants "directly affected" by the Director's decision to issue the Approval?
2. If so, what matters raised by the Appellants are to be considered by the Board at a hearing?
3. Are the appeals filed by the Appellants frivolous and vexatious?

#### **V. CONSIDERATIONS OF THE BOARD**

##### **A. Directly Affected**

[18] Ms. Ash and Mr. Munroe filed their appeals pursuant to section 84(4) of the *Environmental Protection and Enhancement Act* (the "Act"). Section 84(1)(a)(iv) of the Act states that a notice of objection may be submitted:

by the approval holder or by any person who previously submitted a statement of concern in accordance with section 70 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 69(1) or (2), ...

[19] This Board has stated in *Fred J. Wessley v. Director, Alberta Environmental Protection*<sup>9</sup> and again recently in *Kelm*<sup>10</sup> that the determination of whether a person is directly affected within s.84 of the Act must be made on a case by case basis, taking into account the particular facts and circumstances of each appeal.

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<sup>9</sup> Appeal No. 94-001, February 2, 1994.

<sup>10</sup> *Supra*, note 6 at p. 5.

[20] In *Kostuch*<sup>11</sup>, the Board reviewed the principles and authorities concerning the meaning of "directly affected". In that case 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 exceed that of 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. The 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 discernable 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 question of law, i.e., whether the person's interest is supported by the statute in question.”<sup>12</sup>

[21] In dismissing an application for judicial review of the Board's decision on "directly affected" in the *Kostuch* appeal,<sup>13</sup> Marceau J. quoted with approval the first paragraph above and was satisfied that the Board applied the correct test.<sup>14</sup>

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<sup>11</sup> *Supra*, note 5.

<sup>12</sup> *Ibid.*, at p. 257.

<sup>13</sup> *Kostuch v. Alberta Environmental Appeal Board*, Alta. Q.B., Action No. 9503-19741, 28 March 1996.

<sup>14</sup> *Ibid.*, at p. 11.

[22] Persons who file Notices of Objection bear the onus of establishing that they are directly affected by the application.<sup>15</sup> However, in *Hazeldean Community League and Two Citizens of Edmonton v. Director of Air and Water Approvals, Alberta Environmental Protection*,<sup>16</sup> the Board found it important to note, that in *special* circumstances, this onus may be discharged without proof of direct causation.

[23] In order for a non-approval holder to have standing to appeal to this Board, one must be *directly* affected by the decision made by the Director and, by the specific activity approved by the Director. As the Board stated in *Kelm*, to be directly affected under section 84(1)(a):

"... 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 wet pond) and the environmental effect upon the person who seeks to appeal this decision."<sup>17</sup>

#### **1. Ms. Ash**

[24] In our opinion, the facts underlying Ms. Ash's appeal enable the establishment of a causal connection between the Approvals for spraying pesticides within 30 m of the waterways within the City of Calgary and herself. Ms. Ash visits the areas along the waterways (by foot, bicycle and canoe) and within the areas sprayed or potentially sprayed, a minimum of four times per week. She has, on three occasions in the past year, walked through recently sprayed areas and then discovered a sign, either on the opposite side of the sprayed area or lying flat and less visible. Ms.

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<sup>15</sup> Environmental Appeal Board, Rules of Practice, February 1997, Section 29, Burden of Proof, at p. 13.

<sup>16</sup> Appeal No. 95-002, May 11, 1995.

<sup>17</sup> *Kelm*, *Supra*, note 6 at p. 5.

Ash has visited the Inglewood Bird Sanctuary on numerous occasions, and has undertaken painting and sketching activities in various off-trail locations in the Sanctuary as well as throughout the pesticide application areas. Ms. Ash has also provided the Board with general evidence that she teaches classes for private and public educational purposes in potentially sprayed areas.

[25] The Board has considered the argument made by Mr. Crowe on behalf of Ms. Ash, and the statements made by Ms. Ash, and the Board feels that at this point in the proceeding, and in her case, that Ms. Ash has established, on a balance of probabilities, that there is a reasonable possibility that she will be directly affected by the Approvals.

## **2. Mr. Munroe**

[26] With respect to Mr. Munroe, the Board finds insufficient evidence to suggest that Mr. Munroe is *directly* affected. While Mr. Munroe uses the bikeways and pathways in the areas along the Bow River, and has golfed at the Shaganappi Golf Course, he has not raised the same persuasive evidence regarding the effects of the Approvals on him. The Board is not convinced, on a balance of probabilities, that he is any more effected than the thousands of other Calgarians who might be equally effected by these Approvals.

[27] In reaching the conclusion that Mr. Munroe is not directly affected by these Approvals, the Board is certainly not rejecting the concerns raised by him. The Act requires this Board to consider whether a person who files a Notice of Objection concerning an approval is directly affected and, therefore, has standing to appeal the decision. It may be that Mr. Munroe will later apply for intervenor status; his application, like many others perhaps, can respond to the publication of notice of a hearing of this appeal. As usual, each request will be decided on its merits and according to the regulations.<sup>18</sup>

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<sup>18</sup> Environmental Appeal Board Regulation, Alberta Regulation 114/93 as amended, ss. 7-10.

**B. Matters To Be Addressed At Hearing**

[28] Prior to conducting a hearing of an appeal the Board may in accordance with the regulations determine which matters included in notices of objection properly before it will be included in the hearing of the appeal.<sup>19</sup> Prior to making this decision the Board gave parties an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.<sup>20</sup> According to the Act, where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.<sup>21</sup> The Board has considered the submissions made by all parties to this appeal, and has determined that the following issue is the only matter to be addressed in the hearing:

- The impact these Approvals have on affected surface water quality.

[29] The respondent, Alberta Environmental Protection, conceded that four of the Appellants' concerns (expiry date, water quality, wildlife sanctuary, and inert ingredients) would possibly relate to the actual Approval. On balance, the Board was not convinced that three of the issues raised by the Appellants: the Approval expiry date, wildlife sanctuary (Inglewood Bird Sanctuary), and pesticide inert ingredients, were issues that should go forward to a hearing.

[30] The Board was not convinced that the Appellants' concerns with respect to the impacts of pesticides on waterfowl at the Sanctuary were validated by the Appellants on the basis of the arguments made. Prior to issuing the Approval, Alberta Environmental Protection checked with Sanctuary staff and the staff reported no impacts. The spraying associated with the restoration and

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<sup>19</sup> Subsection 87(2), *Alberta Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3.

<sup>20</sup> *Ibid.*, subsection 87(3).

<sup>21</sup> *Ibid.*, subsection 87(4).

reclamation project at the Sanctuary is part of a long-term plan to improve wildlife habitat in the Sanctuary. The Board feels that decisions regarding the use of pesticides in this restoration project and potential impacts should be left to the staff of the Sanctuary,<sup>22</sup> who should know the area, the wildlife, the habitat, and potential environmental impacts, better than anyone else.

[31] In regard to the Appellants' concern with the expiry date of the Approvals, the Board is not convinced that this is a matter that should go forward to a hearing. The Board is persuaded by the submissions made by Alberta Environmental Protection that avenues remain open for new information that may arise regarding adverse effects of approved pesticides and pesticide approvals to be submitted to the Director, and for the Director to then amend, cancel or suspend the Approval(s).<sup>23</sup>

[32] Similarly, the Board was not convinced that the Appellants' concern regarding inert ingredients was a matter that should go forward to a hearing. Health Canada is responsible for testing and approving for registration pesticide products pursuant to the *Pest Control Products Act*.<sup>24</sup> All products to be used under these Approvals are registered for their intended use, and registration of a product is granted only after a determination is made by Health Canada that the product does not present undue risks when used according to the label directions.<sup>25</sup>

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<sup>22</sup> Of course, we expect and assume that all reasonable inquiries are made, including investigations into impacts by Sanctuary staff.

<sup>23</sup> s. 67(3) and s. 73 of the Act, *Supra* at note 18.

<sup>24</sup> R.S.C. 1985, c. P-9.

<sup>25</sup> *Pest Control Products Regulations*, C.R.C. 1978, c. 1253, s. 18(d).

[33] The Board is aware that the courts have upheld the British Columbia Environmental Appeal Board's (the "BCEAB") decision to presume federally-registered pesticides are *generally* safe, limiting jurisdiction to decide whether pesticides have been applied safely and whether a specific site was suitable for safe application.<sup>26</sup> In doing so, the Court provided direction to these types of tribunals in hearing evidence of adverse effects, toxicity, and alternatives to pesticide use.<sup>27</sup> In the City of Calgary appeals, the Board is convinced that the critical issue, given all of the evidence and arguments, is water quality. Therefore, water quality questions influenced by the use of pesticides near surface waters is an issue that should go forward to a hearing. We note that a long and extensive water quality monitoring and testing program involving the Bow River appears to have taken place and we would therefore expect that the hearing will encompass potential impacts from pesticides on water quality.

### C. Frivolous and Without Merit

[34] The City of Calgary and Alberta Environmental Protection both argued that the Board should dismiss the Notices of Objection pursuant to section 87(5) of the Act, on the basis that the four concerns (expiry date, water quality, wildlife sanctuary, and inert ingredients) are frivolous and

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<sup>26</sup> *Cdn. Earthcare Society v. Environmental App. Bd.* (1987), 2 C.E.L.R. (N.S.) 254 (B.C.S.C.), rev'd (1988), 3 C.E.L.R. (N.S.) 55 (B.C. C.A.) - applied. Also, *Islands Protection Society v. British Columbia (Environmental App. Bd.)* (1988), 3 C.E.L.R. (N.S.) 185 (B.C.S.C).

<sup>27</sup> *Ibid.* Taggart J.A. quoted with agreement the lower court's statement:  
"Common sense dictates that the fact that a federally registered pesticide that has undergone extensive testing must have some probative value. I have concluded that the Board did not commit a jurisdictional error by assuming a federally registered pesticide to be generally safe. It is important to bear in mind that the Board did not state that a federally registered pesticide could never cause an unreasonable adverse effect. The Board was willing to hear evidence on toxicity to the extent that the evidence showed that the specific site in question prevented safe application of the pesticide. They further heard evidence whether the proposed pesticide use was contrary to registration intent and restriction or that the permit holder was unable to apply the pesticide safely."

without merit.<sup>28</sup> The Board disagrees, at least with the claims by the City of Calgary and Alberta Environmental Protection that these appeals were *frivolous*. Surely, *frivolous* appeals are only founded in exceptional circumstances.<sup>29</sup> The Board was particularly alarmed with the Director's submission that concerns about water quality be dismissed as frivolous and without merit since, according to the Director, "all applications [of pesticides] are downstream of the City of Calgary's drinking water intakes."<sup>30</sup> The Board takes exception to this line of argument because it disregards consideration of pesticide wind drift, secondary impacts, and most importantly, impacts on downstream users.

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<sup>28</sup> Oral submission, October 23, 1997 and letter to the Board, from Counsel for the Director, dated October 20, 1997, at p. 4.

<sup>29</sup> Black's Law Dictionary (5th ed.) defines frivolous as:  
frivolous appeal: One in which no justiciable question has been presented and the appeal is readily cognizable as devoid of merit in that there is little prospect that it can ever succeed [citing *Brooks v. General Motors Assembly Division* Mo. App. 527 S.W. 2d 50, 53].

<sup>30</sup> Letter, *Supra* note 28 at p. 4. Also, City of Calgary, oral argument.



**DECISION**

[35] The Board finds Ms. Ash is directly affected by the Director's decision to issue the Approvals, and accordingly allows her appeal. The Board dismisses Mr. Munroe's appeal as he is not directly affected by the Director's decision to issue the Approvals. The Board decides that the issue of surface water quality as it relates to these Approvals, is the only matter that will be addressed in the hearing of this appeal.

[36] Dated on November 13, 1997, at Edmonton, Alberta.

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Dr. William A. Tilleman, Chair

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Dr. Ted W. Best

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Mr. Ron V. Peiluck