

ALBERTA ENVIRONMENTAL APPEAL BOARD

DECISION

Preliminary Meeting - November 25, 1998
Date of Decision - December 21, 1998

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

-and-

IN THE MATTER OF appeals filed by Mr. Rudy and Mrs. Genie Mizera, Mr. Adelhardt H. Glombick on behalf of Glombick Farms, Ms. Marilyn Fenske and Mrs. Alice E. Mahlum with respect to Approval No. 20754-00-01/Amending Approval No. W1075 issued to Beaver Regional Waste Management Services Commission by Mr. Wayne Inkpen, Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection.

Cite as: Mizera *et. al.* v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection, *re: Beaver Regional Waste Management Services Commission*.

PRELIMINARY MEETING BEFORE

Dr. M. Anne Naeth
Mr. Ron V. Peiluck
Dr. Curt Vos

APPEARANCES

Appellants:

Mr. Rudy and Mrs. Gertie Mizera,
represented by Mr. Mitch Bronaugh, Mr.
Adelhardt Glombick, Ms. Marilyn Fenske
and Mrs. Alice Mahlum

Parties:

Mr. Grant Sprague, counsel, Alberta Justice,
representing the Director of Alberta
Environmental Protection, and Mr. J. Shaw

Mr. Michael Welsh, counsel, Welsh and
Company, representing Mr. F. Hugo, Mr. F.
Wright and Beaver Regional Waste
Management Services Commission

Other Participants:

Mr. Mark Garstad

TABLE OF CONTENTS

BACKGROUND	I
THE PRELIMINARY MEETING	2
SUMMARY OF THE PARTIES STATEMENTS ON ISSUES AND DIRECTLY AFFECTED STATUS	3
DELIBERATIONS OF THE BOARD ON STANDING AND ISSUES FOR THE HEARING	5
DECISION OF THE BOARD	11

BACKGROUND

[1] The Environmental Appeal Board [Board] received appeals from Mr. Rudy and Mrs. Gertie Mizera dated June 17, 1998, Mr. Adelhardt H. Glombick on behalf of Glombick Farms dated June 22, 1998, Ms. Marilyn Fenske dated June 27, 1998 and Mrs. Alice E. Mahlum dated June 28, 1998 [Appellants]. Each of the Appellants objected to Approval No. 20754-00-01/Amending Approval W1075 issued by Mr. Wayne Inkpen, Director of Northeast Boreal and Parkland Regions [Director], Alberta Environmental Protection [Department], to Beaver Regional Waste Management Services Commission [BRWMSC] for the construction, operation and reclamation of a Class landfill, dated May 29, 1998.

[2] Three similar Notices of Appeal (dated June 25, 1998, June 26, 1998 and one undated) were received from Mr. Dennis Fenske and subsequently dismissed)

[3] The Board acknowledged receipt of each of the Appellants' appeals and requested from the Department of Environmental Protection copies of all related correspondence, documents and materials. In a letter dated June 22, 1998, the Board advised the Beaver Regional Waste Management Services Commission that an appeal had been filed and provided them with a copy of the appeal. Additional appeals received were also forwarded to the BRWMSC.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board [NRCB] and the Alberta Energy and Utilities Board [AEUB] asking whether this matter had been the subject of a hearing or review under their respective Boards' legislation. Replies were subsequently received from the NRCB and the AEUB advising that they did not hold any hearings or reviews of this matter.

[5] On July 28, 1998, the Board forwarded the requested materials from the Department

See Fenske v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection re: Beaver Regional Waste Management Services Commission, EAB 98-236-D dated July 14, 1998.

to all the parties and later advised them on August 7, 1998, that the Board would be proceeding to a mediation meeting. This meeting took place on September 9, 1998, in Ryley with Dr. John Ogilvie as the presiding Board member.

[6] Following the mediation meeting the participants indicated that further discussions would be useful to achieve a possible resolution of these appeals. The Board requested the parties provide a status report by September 25, 1998, advising whether or not further discussions would be warranted and to have the file held in abeyance accordingly; or to hold another mediation meeting; or if no resolution was possible to advise if the Board should proceed to a preliminary meeting.

[7] After review of the status reports received from the parties, the Board decided to conduct a further mediation meeting on November 12, 1998, which was held in Edmonton. Dr. John Ogilvie was also the Board member presiding at that meeting. No resolution was reached at the mediation meeting; therefore, a preliminary meeting was set for November 25, 1998.

[8] An application for interim costs was received on July 29, 1998, from Ms. Karin Buss, counsel for Ms. Marilyn Fenske. The Board replied to this letter on August 11, 1998, advising that the matter of costs would be addressed at a later date, either at the conclusion of or following a mediation meeting. On November 17, 1998, the Board advised all parties that any requests for interim cost would be dealt with at a later date.

THE PRELIMINARY MEETING

[9] The Board held a preliminary meeting on November 25, 1998, in Edmonton pursuant to s. 87 of the *Environmental Protection and Enhancement Act* [the Act]. The purpose of this preliminary meeting was to decide (1) standing issues and (2) determine the matters to be heard at an upcoming hearing.

SUMMARY OF THE PARTIES STATEMENTS ON ISSUES AND DIRECTLY AFFECTED STATUS

[10] Each of the Appellants discussed their directly affected status and the issues they thought were pertinent to a potential hearing. The Department and the BRWMSC responded to the statements of the Appellants.

[11] Mr. and Mrs. Mizera were concerned with litter from the BRWMSC site getting caught in their farm equipment causing delays in work and potential damage to the equipment. They were concerned with noise from the BRWMSC site including cat clattering, the reverse alarms from equipment on the site and BRWMSC traffic on the road. This noise interfered with their ability to sleep in the morning, especially in the summer when the windows were open. They cited sleeping as an important component of their retirement. They were also concerned with liquid waste from the BRWMSC trucks getting on their vehicle tires and hence into their garage, noxious odours, pumping of drainage water onto their land without permission, testing procedures on the liner and the implications of dewatering on the water table. Mrs. Mizera told the Board her asthma was getting worse and she attributed this to the BRWMSC operation, particularly the odours from the site. Both Mr. and Mrs. Mizera experienced other health problems such as headaches, stress and diarrhea. They indicated they met with their MLA in July 1997 and had complained about the problems with no resolution. They also indicated they had talked to the BRWMSC with no results. They believed the proposed expansion would intensify the problems they were already experiencing from the existing operations.

[12] Mr. Glombick was mainly concerned with the impact the BRWMSC operation had on their retirement plans, enjoyment of their dwelling (cottage) on the land and on their farming operations. The Glombicks had planned to retire on their land but would not do so now because of the current operation and the projected expansion, which would bring the BRWMSC operation even closer to their land. The farming operations affected by the BRWMSC operations included the honey

they produced which no one would buy knowing it was produced adjacent to a waste site. Mr. Glombick indicated he was unable to use his land for relaxation and pleasure because of the odour and noise from the BRWMSC site. This noise was often loud enough to be heard over the operation of the combines in the fall. He told the Board he was also concerned with landfill gases, health concerns such as cancer, water contamination, appropriateness of the proposed clay liner and litter.

[13] Ms. Fenske was mainly concerned with the direct impact of the BRWMSC operation on their farming activities. They experienced problems with plastic waste in the hayfields which affected machinery operation and potentially could be consumed by their livestock. Ms. Fenske shared the same concerns about noise and odour as the Mizeras. She was concerned with water quality in their dugout and their domestic water supply as a result of leachate from the BRWMSC site, snow relocation into the ditches and pumping of leachate water. Ms. Fenske indicated their hay yield was affected by the BRWMSC operation and this coupled with their livestock potentially ingesting waste and contaminated water could lead to a decline in their livelihood. She indicated the problems already experienced as a result of the current BRWMSC operation would be magnified by the proposed expansion.

[14] Mrs. Mahlum was concerned mainly with noise and odour. She indicated her asthma was getting worse in the past three years and she now needed to use a "puffer". Mrs. Mahlum said she previously suffered from one or two migraines a year; now she was plagued with them two to three times a month. She attributed these effects directly to the BRWMSC operations. The noise from the site, including the cat (dozer) clattering, was a major disturbance to her. She believed retired people should not have to put up with those distractions, which were bad enough at times that she was not able to go outside and enjoy the evenings in the summer. She indicated she was affected 25 to 33% of the time. Her other concerns included hay growth on the pasture, general effects on the farming industry and proper abandonment of water wells. Mrs. Mahlum said she believed all of these problems would be increased as a result of the expansion.

[15] Mr. Sprague indicated the Board must look for a cause and effect to determine

directly affected status. Geographic proximity to the site should be considered important in this regard. He summarized that the Mizeras, Mr. Glombick and Ms. Fenske may be directly affected. He did stress that since Mr. Glombick was not a resident he would not likely be directly affected. Because Mrs. Mahlum lived 2.5 miles from the site, the amendment would not bring anything closer to her and thus she would not be directly affected. Mr. Sprague cautioned the Board that many of the issues, such as water diversion, were more properly focused on the *Water Act*. He indicated the property value issues were planning, not environmental matters. He suggested groundwater, litter, noise and odour are the issues for the hearing.

[16] Mr. Welsh emphasized the state of the art design of the expansion. He suggested the noise from the railroad and the highway was as much an issue as the BRWMSC site. Similarly the odour from the sewage lagoon was as much a problem as that from the BRWMSC site. He indicated litter may blow from the site from time to time but it was always picked up immediately. He stressed that the amendment did not affect anyone more than the original approval and the original approval was not in question at this time. He further stressed that most of the issues raised had provisions for being dealt with in the detailed approval. He indicated most of the Appellants would only be directly affected by a substantial legal stretch but that Ms. Fenske would be the most likely directly affected. He told the Board that Ms. Fenske's issues were clouded by other facts. Mr. Welsh believed the issues for the hearing should focus on groundwater, litter, surface water, odour and noise.

DELIBERATIONS OF THE BOARD ON STANDING AND ISSUES FOR THE HEARING

[17] The issues dealt with at the preliminary meeting were to determine standing and to determine the matters to be heard at an upcoming hearing. The Board believes the issues to be dealt with at the hearing will be those raised by the Appellants who are directly affected. Thus, this decision will focus on the directly affected issue first.

[18] The Board stresses that there is no simple test to determine whether a person is

directly affected within s. 84 of the Act. As stated in *Fred J Wessley v. Director of Environmental Protection*,² this determination must be made on a case by case basis, taking into account the particular facts and circumstances of each appeal. Cases that raise the directly affected argument are so fact dependent that it is impossible to stabilize a rule that can be followed in each case.

[19] In *Dr. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*³, 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. 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 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."⁴

² *Fred J. Wessley v. Director, Alberta Environmental Protection* (February 2, 1994) Appeal No. 94-001.

³ (1995), 17 C.E.L.R. (NS) 246.

⁴ *Ibid.*, at p. 257.

[20] The first paragraph of the passage was quoted with approval by J. Marceau in a judicial review application⁵ 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 test⁶ and dismissed the application.

[21] In its February 2, 1994 decision *Maurice Boucher v. Director, Alberta Environmental Protection*,⁷ the Board found appellants not directly affected because their concerns were of a remote, non-environmental consequence of the issuing of an Approval.

"The Board finds that the appellants do not have a substantial interest in the outcome of this proposed water transmission line that surpasses the common interest of all residents in the ID who will be affected by this approval. To be directly affected by this project, the appellants must show some special indicia of environmental effect that will directly be felt by them -- as opposed to the residents of the ID at large. Showing special indicia depends upon the nature of the causal connection between the project appealed and the effect upon the complaining party. It is possible that concerns over economic matters may be relevant in establishing a causal connection with the project appealed, but there must *first* be an environmental effect that is directly felt by the appellants."

[22] The Board's interpretation of "directly affected" is consistent with 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*

⁵ *Martha Kostuch v. Alberta Environmental Appeal Board and the Director of Air and Water Approvals Division*, 35 Admin. L.R. (2d) 160 (Q.B., March 28, 1996), the original decision is found at 17 CELR (N.S.) 246 (E.A.B., August 23, 1995).

⁶ *Ibid.*, at p.11.

⁷ *Boucher v. Alberta (Director, Environmental Protection)*, (February 2, 1994), Doc. Appeal No. 93-004 (Alta. E.A.B.).

⁸ *C.U.P.E., Local 30 v. W.M.I. Waste Management of Canada Inc.* (1996), 34 Admin. L.R. (2d) 172 (Alta. CA.).

Advisory and Appeal Board [PHAAB].⁹ In fact, in *Boucher*, one of the Environmental Appeal Board's earliest cases on standing, this Board reached the same general conclusion as the courts in the PHAAB cases although this Board's decision was released before the decision of Justice Agrios in the PHAAB case. In the PHAAB cases, the courts 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 of Appeal 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

[23] 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 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

⁹ *Friends of the Athabasca Environmental Assn. v. Alberta (Public Health Advisory & Appeal Board)*, 34 Admin. L.R. (2d) 167, (Alta. C.A.).

¹⁰ *Ibid.*, at p. 8.

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

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

[24] This Board considers that persons who file notices of appeal bear the onus of establishing that they are directly affected by the application.¹³ Yet it is important to note, as the Environmental Appeal Board did in *Hazeldean Community League and Two Citizens of Edmonton v. Director of Air and Water Approvals, Alberta Environmental Protection*,¹⁴ that in special circumstances this onus may be discharged without proof of direct causation. The Board is concerned that appellants face a labyrinth of procedural barricades which must be hurdled or avoided before they can be heard on the merits of their case. The Board does not want to dismiss a case that is clearly meritorious when there is a likelihood that a hearing on the merits will substantiate standing in law.

[25] As the Board noted in *Dr. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*,¹⁵ the Alberta Court of Appeal recognized and commented on this dilemma in *Leduc (County No. 25) v. Local Authorities Board*¹⁶. The Court of Appeal stated that:

"If the section is to be construed as requiring the person proposing to intervene to show with certainty that his rights *will* be affected, how is he to do it? A tribunal cannot know with any certainty at the start of the hearing what the proceeding will

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. EA.B.).

¹⁵ *Ibid.*, at pp. 15-16.

¹⁶ (1987), 54 Alta. L.R. (2d) 396.

involve . . . "

"The Board, by the nature of its task, is bound to make its ruling at an early stage of the proceeding. It is bound to rule fairly on a balance of probabilities whether the hearing has the potential to affect or vary a person's rights given the variations in result possible at the conclusion of the hearing".¹⁷

[26] The Board is persuaded by the comments of the Court of Appeal. The Board's task is to determine at this preliminary stage of the proceedings whether on a balance of probabilities there is a potential, that is, a reasonable possibility, that any of the parties will be directly affected by the application.

[27] The Board believes that all of the Appellants with the exception of Mrs. Mahlum demonstrated a sufficient potential linkage of their concerns with the expanded BRWMSC operations. Each of these Appellants would be in closer proximity to the BRWMSC operations if the amendment approval was upheld. Although Mrs. Mahlum shared many of the concerns of the other Appellants she failed to convince the Board that the amendment impacts her directly and personally.

[28] All of the Appellants shared concerns about litter and waste spillage, odour, noise and surface and groundwater quality that could have a potential specific impact on their personal health and quality of life. These concerns were also extrapolated to have an impact on their livestock and other components of their farming operations. A buffer zone in the vicinity of the expanded operation was briefly discussed as a mitigating measure to these impacts. Thus, each of these issues can be addressed at the appeal hearing.

¹⁷ *Ibid.*, at pp. 399-400.

DECISION OF THE BOARD

[29] The Board has determined that Ms. Marilyn Fenske, Mr. Adelhardt Glombick and Mr. Rudy and Mrs. Gertie Mizera are directly affected and as such will be parties to the upcoming appeal hearing. The Director and the Beaver Regional Waste Management Services Commission will also be parties to these appeals.

[30] The issues to be discussed at the hearing are: litter and waste spillage, noise, odour, surface and ground water quality, health and quality of life and buffer zone.

Dated on December 21, 1998 at Edmonton, Alberta.

“original signed by
Dr. M. Anne Naeth

“original signed by
Mr. Ron V. Peiluck

“original signed by
Dr. Curt Vos