ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Hearing by Written Submissions: October 1, 1999, October 13, 1999
Final Replies: October 20, 1999
Date of Decision: November 19, 1999

IN THE MATTER OF Sections 84, 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 March 18, 1999 by the Whitefish Lake First Nation with respect to Amending Approval 45-00-05 issued on February 5, 1999 to Tri Link Resources Ltd. by the Director, Northwest Boreal Region, Alberta Environment.

Cite as: Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment, *re: Tri Link Resources Ltd.*

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I. BACKGROUND

[1] The link between environmental and aboriginal law is becoming increasingly prominent in Canada, as aboriginal groups assert their rights to natural resources with increasing vigour and as public concern for the sustainable use of those same resources grows. This Decision addresses the extent to which the Environmental Appeal Board (Board) must consider that link when aboriginal law is raised as a ground for an otherwise valid Appeal to the Board.

[2] This is an Appeal of an "amended approval" issued by the Director of the Northwest Boreal Region, Alberta Environment (Director), to Tri Link Resources Ltd. (Tri Link). The amendment allows Tri Link to add an additional "booster compressor" to its "Seal Gas Processing Facility," which is a sour gas plant located in a remote, mixed forest and muskeg region in the north-central part of Alberta. According to Tri Link, it needs the additional compressor to "maintain current volumes of raw gas being delivered to the plant and to mitigate competitive drainage."[1] To accommodate this addition, Tri Link sought the Director's approval to, among other things, increase the plant's overall air emissions of nitrogen oxides (NOx) by over 20%.[2] The Director issued the amended Approval pursuant to Division 2 of Part 2 of the *Environmental Protection and Enhancement Act* (the Act), S.A. 1992, Ch. E-13.3.[3]

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1 October 13, 1999 letter to the Board from James McCachin/Tri Link at 1.

2 See Tri Link's Application, para. 1.h.3.1 - 3.2.

3 As relevant here, sections 58 and 59 of that Division prohibit activities designated in regulations without an Alberta Environment Director's "approval." The designated activities include sour gas processing plants. Activities Designation Regulation, A.R. 211/96, Div. 2, Part 8, s. (h)(iv). Section 64 of the Act prohibits pollution-inducing "change[s]" to any approved activities, except pursuant to a new approval or amended approval issued by the Director.

[3] The Appellant is the Whitefish Lake First Nation (First Nation), whose claimed "traditional territories" include the area in which the Seal plant is located.[4] The Appellant claims to have "treaty, constitutional, and aboriginal rights" to those territories, including the rights to "hunt, trap, fish, gather plants, and hold sacred ceremonies."[5] For brevity, the Board will refer to these three sets of claimed legal rights collectively as "aboriginal law claims" or "claimed aboriginal rights."

[4] In its Notice of Appeal, the First Nation asserts that there is a "potential" that its aboriginal rights will be impaired by air pollution from the Seal plant, and by other, unspecified, environmental impacts on the flora and fauna of the area.[6] The Notice further states that, given these "potential" effects, the Director had a duty to "consult" with the First Nation prior to deciding whether to issue the amended Approval, for purposes of: (1) obtaining information on the First Nation's uses of the potentially affected areas and how those uses might be impaired; and, (2) "advising" the First Nation "of the potential for infringement of its rights."[7] The Notice of Appeal then claims that the Director failed to fulfill these consultation obligations and, as a result, the "amendment" should be withdrawn.[8]

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4 Notice of Appeal, at 1, para. 1.

5 *Ibid.* at 1, para. 2.

6 *Ibid.* at 1, para. 3.

7 *Ibid.* at 1, para. 4.

8 *Ibid.* at 2. Notably, the Notice seeks the withdrawal, not of the underlying Approval, itself, but only of the 1999 amendment to that Approval allowing Tri Link to install a new compressor.

[5] In response to the Board's request, the First Nation's counsel provided additional information on the nature of the First Nation's claims. In its response, counsel asserted that the First Nation's right to hunt, fish and trap "requires protection of the habitat of the fish and game" and that this habitat is "threatened," on an individual and cumulative basis, by the "release of contaminants" from the Seal plant, "including SO_2 and NO_x emissions and the resulting acidifying emissions and creation of ground level ozone."[9] The response also refers to additional, unspecified environmental threats from the "increased human activity and access" to the area.[10] According to the submission, the Director's decision to issue the amended Approval "permit[s] the indirect, but potentially devastating erosion of the First Nation's ability to harvest resources to sustain their traditional vocations and way of life."[11] The submission further asserts, as the "primary basis" for the Appeal, that neither the Director nor Tri Link have "adequately assessed" these potential impacts.[12]

[6] While asserting this "primary" environmental impacts claim, the First Nation also asserts, as the "gravamen" of its "complaint," that the Director failed to fulfill the two consultation duties listed in paragraph 5 above.[13]

[7] The Board notes that the relationship between the First Nation's two claims–failure to adequately consider environmental impacts and failure to consult–is not entirely clear. However, the

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9 August 19, 1999 Buss letter at 1.

10 *Ibid.* at 1-2.

11 *Ibid.*

12 *Ibid.*

13 *Ibid.* at 2. For clarity, the Board emphasizes that the First Nation's consultation claim is aimed at the Director. The First Nation does not claim that the Environmental Appeal Board itself has a consultation duty above and beyond its normal hearing procedures or that the Board has any other special fiduciary obligation to the First Nation. See, e.g., Quebec (Attorney General) v. Canada (National Energy Board), [1994] 1 S.C.R. 159 (role of federal quasi-judicial tribunal did not include fulfilling the federal government's general fiduciary obligations to Canadian aboriginal peoples); Walpole Island First Nation v. Ontario (Consolidated Hearings Board), [1997] 35 O.R. (3d) 113 (Ont. Gen. Div.) (relying on the Supreme Court of Canada's Quebec decision to hold that a provincial environmental appeal board did not have a fiduciary duty to the Walpole Island First Nation).

Board assumes for purposes of this Decision that the First Nation intends the former claim to be dependent on the latter, rather than an independent claim–*i.e.*, that the Director's alleged failure to adequately consider the plant's environmental impacts results directly from his alleged failure to consult with the First Nation prior to issuing the amended Approval. Given this assumption, the Board will hereinafter refer to the First Nation's two claims collectively as the "consultation claim."

[8] Following the First Nation's August 19, 1999 response, the Director filed a letter requesting that the Board dismiss the First Nation's Appeal, pursuant to section 87(5)(i.2) of the Act. That section authorizes the Board to dismiss an Appeal "for any . . . reason" which the Board considers the Appeal to be "not properly before" the Board. The Director's letter argues that the Appeal is "not properly before" the Board, in essence, because the consultation issues which it raises are issues of constitutional law which have little, if anything, to do with the merits of the "substance" of the amended Approval.[14] The Board requested, and received, written submissions from all of the parties on the Director's dismissal request.

[9] Based on the following analysis and upon a thorough review of those submissions, the Board concludes that the Appeal should be dismissed.

II. THE BOARD'S ANALYSIS

[10] The Board was created by Part 3 the Act. As such, the Board has the power to decide only those matters provided for by that Part.[15] The Board's legislatively restricted jurisdiction is confirmed by section 83(2) of the Act which states, as relevant here, that the Board shall hear

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[14] September 9, 1999 letter from Grant Sprague, Alberta Justice.

[15] The *Alberta Water Act*, S.A. 1996, c. W-3.5, has expanded the Board's decision-making functions to cover matters arising under that statute. However, those matters are not at issue in this Appeal, so the only relevant authorizing legislation is the *Environmental Protection and Enhancement Act*.

Appeals "as provided for in this Act. . . ." The following two sections address the scope of the Board's jurisdiction under the Act in terms of: first, the scope of Alberta Environment decisions which can be appealed to the Board; and, second, the scope of appeal *grounds* which the Board can consider in reviewing those appealable decisions.

A. The Scope of Decisions Which Can Be Appealed To The Board

[11] Section 84(1) provides the basic legislative restriction on the Board's decision-making authority, by listing the specific kinds of decisions which can be appealed to the Board. That list includes approvals and approval amendments issued by an Alberta Environment Director under Division 2, Part 2 of the Act. The First Nation has appealed the Director's decision to issue a Division 2, Part 2 "approval amendment" and, thus, the Board clearly has jurisdiction to review the decision being appealed by the First Nation.

[12] In its written submission, the Director suggests that the validity of the amended Approval is really "secondary" to the First Nation's desire for affirmation of the "existence, extent and nature of the [First Nation's] right to be consulted . . . based on the [First Nation's] constitutional, treaty and aboriginal rights."[16] The Board believes this characterization is misplaced. The First Nation's Notice of Appeal demonstrates that the object of the First Nation's Appeal is the Director's amended Approval and that the relief requested by the First Nation is, not a broad declaration regarding its legal rights, but simply a withdrawal of the amended Approval. Under these circumstances, the amended Approval is not "secondary" to the First Nation's Appeal.

[13] The Director also argues, in his counsel's October 13, 1999 submission, that the First Nation "does not assert that the approval as drafted offends the [First Nation's] rights. . . ."[17] The Board is hard pressed to understand this contention. The amended Approval's terms appear to allow

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[16] October 13, 1999 letter from Grant Sprague/Alberta Justice at 3.

[17] *Ibid.*

additional pollution which the First Nation claims could singly and cumulatively impair the habitat which supports its hunting and other uses of the affected area. Thus, the First Nation clearly opposes those terms, even if its submissions to date have not focused on precise approval terms and those terms' technical merits. Moreover, the First Nation's claims are partly procedural in nature. Yet, there is no *per se* rule precluding Appellants from raising procedural grounds in Appeals of otherwise valid and appealable Alberta Environment decisions.

[14] In sum, the Board clearly has jurisdiction to review the Director's decision to issue the amended Approval. The next section addresses the justiciability of the particular grounds raised by the First Nation in its Appeal of that decision.

B. The Scope Of Appeal *Grounds* Which The Board Can Consider

[15] Besides trying to downplay the significance of the Director's amended Approval as the focus for this Appeal, the Director also argues that the Board should not consider the legal grounds raised by the First Nation as the basis for its Appeal of the amended approval. According to the Director's October 13, 1999 submission, those legal grounds lie outside of the legal requirements of the Act, and they raise important and complex factual and legal issues which are normally resolved by trial courts in the first instance, and which are outside of the expertise of this Board.

[16] As explained below, the Board agrees only in part with the Director's position.

1. The Statutory Framework For The Scope Of Appeal Grounds

[17] As noted in part II.A. of this Decision, section 84(1) of the Act lists the specific decisions that can be appealed to the Board. But that section places no express limit on the actual *grounds* which the Board can consider in hearing appeals of those decisions.[18] Given the jurisdictional nature of section 84(l), this silence implies that the Board has discretion to accept a wide scope of appeal grounds, *as long as* those grounds relate directly to an otherwise appealable decision under section 84(l).

[18] This inference is supported by the plain meaning of two other sets of express provisions in Part 3 of the Act. One set of these provisions relates directly to the Board's own criteria for choosing the scope of appealable issues. Section 87(2) authorizes the Board to forego considering the merits of particular appeal grounds which the Board "determines" are not "properly before" the Board. Similarly, section 87(5)(a)(i.2) grants the Board discretion to dismiss an entire Appeal if it is "not properly before" the Board. This twice-repeated phrase, on its face, is quite broad and, thus, gives the Board wide discretion in choosing which matters to consider.

[19] Notably, section 87(2) provides several criteria which the Board "may" consider in determining which grounds are "properly before" it, but none of those criteria relates even remotely to consultation claim raised by the First Nation. Similarly, sections 87(5)(a) and (b) list additional discretionary and certain mandatory criteria, respectively, for the Board to dismiss entire Appeals, but

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[18] While not limiting the appeal grounds, that section does limit the categories of people who can initiate appeals of the listed appealable decisions. As relevant here, section 84(1)(a) provides that a decision to issue an approval or approval amendment may be appealed by the approval holder or by "any person who . . . is directly affected" by the decision and who "previously submitted a statement of concern" to the Director pursuant to section 70 of the Act. The First Nation appears to have submitted the requisite "statement of concern." See December 18, 1998 letter from Karin Buss to Alberta Environment (Tab 8 to the decision record provided by the Director [hereinafter AEP Record]). And the Board is satisfied, at least at this preliminary appeal stage, and until contrary evidence is received, that the First Nation could be "directly affected" by the Director's Approval amendment, based on the First Nation's claimed uses of the general area including the gas plant for hunting and fishing, trapping, and gathering. See August 19, 1999 Buss letter to the Board at 1-2. Notably, while disputing the *justiciability* of the issues raised in the First Nation's Appeal, neither the Director nor Tri Link have questioned the First Nation's *standing* to file the Appeal under section 84(1)(a).

none of these criteria refers expressly to the appeal ground raised by the First Nation.[19]

[20] The Director's submission does not admit the inherently broad nature of the Board's expressed authority to determine which issues are "properly before" the Board. Rather, the Director argues that the only legal grounds which can possibly be "properly before" the Board are those which are found within the four corners of the Act. The Director cites, as the textual basis for this interpretation, the statement in section 83(2) that the Board shall hear appeals only "as provided for in this Act. . . ." The Director reads too much into this quoted term. As discussed above, section 84(1)(a) "provide[s] for" appeals of approval decisions like the amended Approval in this Appeal, and sections 87(2) and (5)(a)(i.2) "provid[e] for" the Board to decide which of those appeals or particular grounds are "properly before" the Board. In short, the above-quoted term in section 83(2) does not itself state that the only legal grounds which the Board may consider, in an Appeal which is otherwise "provided for" in the Act, are those arising completely within the Act's four corners. In other words, sections 84(1)(a) and 87(2) and (5) of the Act themselves "provid[e] for" the Board to consider a wide range of appeal grounds, at least, in the context of decisions listed in section 84(1) that are validly before the Board.

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[19] Of particular note, section 87(5)(b)(i) *requires* the Board to dismiss an Appeal which raises Appeal grounds that were raised in a proceeding conducted by the Alberta Energy and Utilities Board (EUB), formerly known and referred to in that section as the Energy Resources Conservation Board. Under that section, dismissal is warranted if the appellant "received notice of or participated in or had the opportunity to participate in" the EUB proceeding and the appellant's issues were "adequately dealt with" by the EUB. In this case, the EUB apparently held a hearing and issued its own approval for the same compressor addition that was permitted by the Director in the Approval amendment which the First Nation has appealed to this Board. See EUB's April 6, 1999 letter to the Board and EUB's Amending Approval No. 1998-3238 (AEP Record, Tab 5). It is unclear, however, whether the First Nation participated in, received notice of, or had an opportunity to participate in, the EUB's proceeding. It is also unclear whether the EUB "adequately dealt with" the consultation claim which the First Nation raises as grounds for this Appeal. However, given the Board's decision to dismiss the Appeal on other grounds, these issues need not be decided. But the Board wishes to point out the significant jurisdictional importance of those other issues.

[21] Notwithstanding the above analysis, the Board agrees with the Director in the sense that the only issues which the Board can reasonably determine to be "properly before" it are those which relate to the Act's broad environmental protection objective.[20] The Board has previously construed this objective as providing a legislative "definition or perspective of the 'public interest.'"[21] Accordingly, the Board has also noted that the Board's own decisions should seek to promote the "'public interest' *viewed in light of the purposes of the Act*. . . ."[22]

[22] The other set of relevant provisions of the Act are sections 91 and 92. The former specifies the Board's actual decision-making function. In the case of approval decisions like the amended Approval at issue here, section 91(1) states that the Board's function is limited to submitting a "report" to the Alberta Environment Minister with "recommendations" on how the Minister should address the Appellant's complaint. Under section 92(1), the Minister has plenary authority to "confirm, reverse or vary the decision appealed" and to "make any decision" that the Director himself "could make." This reference to the scope of the Director's decision-making authority suggests strongly that the Board can consider all legal and even non-legal factors related to a decision of Alberta Environment which the Director must consider and make. Otherwise, the Board could not reasonably perform its function of fully advising the Minister on the appropriateness of the Director's decision.

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20 As stated in section 2, that objective is to "support and promote the protection, enhancement and wise use of the environment while recognizing," among other things: that environmental protection is "essential" to "the integrity of ecosystems and human health and to the well-being of society;" the "need for Alberta's economic growth and prosperity in an environmentally responsible manner;" and "the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations. . . ." Sections 2(a), (b), and (c) of the Act.

21 *Bildson v. Acting Director of North Eastern Slopes Region #2, Alberta Environmental Protection, re: Smoky River Coal Limited*, EAB No. 98-230-D2 (December 8, 1998) at 12, para. 28.

22 *Ash v. Director of Southern East Slope & Prairie Regions, Environmental Regulatory Service, Alberta Environmental Protection, re: City of Calgary*, EAB No. 97-032 (June 8, 1998) at 9, para. 22 (emphasis added); see also *Bildson*, *supra* note 21 at 13 n. 24.

[23] Combining these two sets of statutory provisions, the Board concludes that the widest scope of appeal grounds which are "properly" before it are those factors: (1) which relate to the environmental, "public interest" objectives of the Act; *and*, (2) which the Director considered, or should have considered, in making the decision that has been appealed to the Board. The Board stresses, however, that the scope of appeal grounds defined by these factors represents the *outer limit* of permissible appeal grounds. The "properly before it" standard implicitly gives the Board wide discretion to choose a *narrower* scope of appeal grounds in any particular Appeal.

2. Applying The Statutory Framework To The First Nation's Consultation Claim

(a) Does The First Nation's Claim Relate To The Environmental, "Public Interest" Objectives Of The Act?

[24] Applying the overall legislative framework described in the preceding paragraph, the first question is whether the First Nation's claim relates to the environmental "public interest" objectives of the Act. The Board believes that potentially it does. Although the First Nation's consultation claim arises from legal sources outside of the Act, that claim is connected directly to the First Nation's concerns regarding the environmental impacts of the Seal gas plant. This connection is obvious: the First Nation is concerned that the plant's environmental impacts will injure its members' uses of the affected lands and, likewise, their legal rights to those uses.[23] Assuming those members are directly affected by the Director's decision, the Act was clearly intended to address concerns about the environmental impacts on legal rights, and uses of natural resources stemming from those rights, because those concerns plainly fall within the Act's broad focus, as noted above, on the

[23] See August 19, 1999 Buss letter at 1-2; October 1, 1999 Buss letter at 2-6.

environmental aspects of the overall "public interest." In terms of the specific language of the Act's purpose section, the minimization of environmental impacts on sustainable uses of natural resources and, correspondingly, on the legal rights to those uses, plainly falls within the concepts of the "well-being of society," "prosperity," and "sustainable development" (which, in turn, is aimed at protecting the "use" of the environment by "future generations"), all of which are "recognized" values under sections 2(a), (b), and (c) of the Act.

[25] Thus, in the *Stelter* Appeal, the Board deemed it necessary, in fulfilling its Appeal function under the Act, to weigh the merits of a proposed wastewater treatment system against the claimed environmental impacts of the system's discharges on a "downstream" landowner's use of land and his common law rights to that land, even though those legal rights originated outside of the Act itself.[24]

[26] The Board does not intend the above discussion to imply that all of the First Nation's interests related to the gas plant fall within the Act's environmental "public interest" focus and are cognizable by this Board. Thus, for example, it would likely not be "prope[r]" for the Board to consider a claim by the First Nation that the Director's amended Approval for the Seal gas plant was invalid because Tri Link was violating some law other than the Act by not paying the First Nation royalties from its sale of the gas processed by the plant. Tri Link attempts to paint just such a picture of the First Nation's claim, by asserting that the First Nation's "primary motivation" for filing this Appeal is "not founded on environmental concerns. . . ." Rather, according to Tri Link, the First Nation's Appeal is "an attempt to . . . persuade Tri Link . . . to enter into" a "Benefits Impact Agreement" committing Tri Link to pay the First Nation fees for using lands claimed by the First Nation.[25] Whether or not any such fees would be intended to reimburse the First Nation for damages

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[24] *Stelter v. Director of Air and Water Approvals Division, Alberta Environmental Protection, re: GMB Property Rentals Ltd.*, EAB No. 97-051 (May 22, 1998) at 12 ("[T]he Board believes it has the responsibility to ensure that the Director, in making his environmental quality decisions, does not contravene rights of others that may be protected by the common law.").

[25] October 13, 1999 McCachin letter to the Board at 4; see also *ibid.* at 2-3.

from environmental impacts, the Board believes that such compensation issues are beyond the scope of the Act, which deals with compensation in only narrow contexts which are not relevant here.[26]

[27] However, without more, Tri Link's un-sworn letter is simply insufficient proof that the First Nation's "true" intent in filing this Appeal is anything other than the environmental concerns raised on the face of the First Nation's Notice of Appeal and subsequent filings. The Board will not look behind those documents to discern an "ulterior motive" absent compelling evidence that such a motive truly exists.

[28] In sum, although the First Nation's claim rests on legal grounds which arise outside of the four corners of the Act, the First Nation's claim appears to be grounded in environmental concerns which relate directly to the Act's environmental, "public interest" objectives.

(b) Did The Director Consider, Or Should He Have Considered, The First Nation's Consultation Claim?

[26] See, *e.g.*, under the Act sections 116 (compensation related to contaminated sites) and 207 (civil actions for loss resulting from offenses under the Act).

[29] As noted previously, the Board can consider only those matters which the Director considered or should have considered in making the approval decision which is appealable to the Board. The scope of matters which the Director can consider in deciding whether to issue approvals or approval amendments appears to be bounded only by the environmental, "public interest" objectives specified in section 2 the Act.[27] The preceding section of this Decision concluded that the First Nation's claimed aboriginal rights to the lands surrounding the gas plant, and its members' uses of those lands, are connected to the Act's objectives. Thus, the Director would have to consider the potential impacts of his approval decision on those claims and accompanying uses, once they were brought to his attention in a Statement of Concern, *if the Alberta government recognized the validity of the First Nation's legal claims*. However, the Board is unaware of any law requiring or allowing the Director himself to decide for the Alberta government whether those claims are valid.[28] Thus, in deciding whether to issue or amend an approval in the face of potential environmental

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[27] See *Bildson v. Director, supra* note 21 at 12-13, paras. 28-31. Section 65(1) of the Act authorizes the Director to issue or deny an approval, but does not provide any limits on the scope of the Director's discretion in making that decision. Section 65(2) provides some, but only minor, limits by stating that the Director may issue an approval subject to any terms which the Director considers "appropriate." Similarly, section 67(1) authorizes the Director to amend an approval if the Director considers it "appropriate" to do so.

[28] The Director argues strenuously that the validity of the First Nation's aboriginal rights should be determined by courts, in the first instance. September 9, 1999 Sprague letter at 1; October 13, 1999 Sprague letter at 2. The Board finds this approach unacceptable, in part, because it takes much of the policy-making and dispute resolution initiatives out of the Alberta government's hands and places those functions solely into the hands of the courts. This result, in turn, could weaken the province's political autonomy and ability to dictate its own destiny.

Second, the Director's proposed approach postpones the resolution of aboriginal/natural resource disputes. That postponement could make them more intense and less able to be resolved amicably. The Board notes the controversy and violence that followed the Supreme Court of Canada's recent adjudication of aboriginal fishing rights in the Maritimes. See *R. v. Marshall*, [1999] S.C.J. No. 55 (S.C.C.) (dismissing prosecution against Mi'kmaq Indian for catching eels out of season, based on finding that the Indian had a treaty right to catch and sell fisheries in order to earn a "moderate" livelihood). The federal Fisheries Department has received considerable criticism for not taking a more pro-active approach in resolving native/non-native allocation and conservation issues in that area. In making this observation, the Board does not mean to dismiss the courts' important role in adjudicating aboriginal rights, to judge the merits of these criticisms of the Fisheries Department, or to comment on the validity of the *Marshall* decision itself. Quite the opposite; the superior court clearly has a role. The Board's only point is simply that there can be compelling reasons why government natural resource managers should become more active in resolving environment and conservation issues.

impacts on legal claims and accompanying uses by a First Nation, the Director should first obtain the Alberta government's position on the validity of those claims and then factor that position into his discretionary consideration of the "public interest" in light of the Act's objectives in section 2.

[30] Although the record is unclear, the Board presumes that the Director did in fact inquire as to the Alberta government's position on the validity of the First Nation's claimed aboriginal rights and found that the government disputed their validity as a matter of geographic uncertainty. The Board draws this inference from the Director's overall opposition to the First Nation's Appeal, and from the record documents reflecting communications between the Director's staff and an official from Alberta Environment's "Indian Affairs" division.[29]

[31] In short, it would not have been appropriate for the Director, within the Department of Environment, to decide the validity of the First Nation's claimed aboriginal rights. And because the scope of factors which the Board can consider is a function of the scope of factors which the Director can consider, it would likewise be inappropriate for the Board to decide the validity of the First Nation's claimed aboriginal rights. Thus, in the words of section 87 of the Act, the validity of those rights is not "properly before" the Board.

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[29] See AEP Record, Tab 13 (handwritten note referring to discussions with "Indian Affairs" and noting that, "according to EUB records, it is Lubicon land.") See also January 14, 1999 letter from Equinox Engineering (Tri Link's consultant) (indicating Tri Link's "understanding" that the lands at issue are those of the "Lubicon Lake Indian Band," not the Whitefish Lake First Nation. AEP Record, Tab 12.

[32] The First Nation argues to the contrary based, in part, on the Board's approach in the *Stelter* Appeal. In that Appeal, the Board took Stelter's common law rights into account in considering the merits of an approval allowing wastewater discharges on Stelter's land. However, in that Appeal, the Board did not actually need to "determine" Mr. Stelter's common law rights, because they were uncontested by the parties. By contrast, in order to grant the relief requested by the First Nation, the Board must "determin[e] and declar[e]" the validity of the First Nation's claimed aboriginal rights.[30]

(c) Are There Other, Discretionary Factors Weighing Against The Board's Consideration Of The First Nation's Consultation Claim?

[30] In *Okanagan Indian Band v. Deputy Comptroller of Water Rights* (1998), [1999] 3 C.N.L.R. 190 (B.C. E.A.B.), the B.C. Environmental Appeal Board reached a somewhat different conclusion, in deciding that it had jurisdiction to consider a claim that a water diversion licence infringed a B.C. Indian Band's aboriginal rights. The B.C. Board reached this conclusion, in part, due to the B.C. Board's findings regarding the "integral" relationship between those rights and natural resource issues and the need for B.C.'s natural resource managers to consider those rights. [QL at 20-21, para. 27]. This Board agrees with the B.C. Board's findings. However, it is one thing to consider aboriginal rights in making natural resource/environmental decisions, and another thing to actually decide the provincial government's position on the validity of those claimed aboriginal rights.

[33] As noted above, the Board has discretion to consider a wide range of factors in deciding whether any given appeal issue is "properly before" it, in addition to whether the issue relates to the Act's objectives and whether it is one which the Director could have considered. Based on this discretion, the Board concludes that the First Nation's aboriginal law claim is not "properly before" the Board for additional reasons related to expertise and division of powers. As to the issue of expertise, whatever expertise and background the Board members have, it does not include the training to decide the range of historical factual issues, and common law, treaty, and constitutional legal issues which arise in determinations of aboriginal law claims.[31] As to the second reason, it would simply be improper for the Board, sitting as an appellate tribunal on environmental matters, to determine the Alberta government's position on the validity of particular aboriginal law claims, given that the potential ramifications of that position extend well beyond the environmental field.

III. CONCLUSION

[34] The Board concludes that the validity of the First Nation's claimed aboriginal rights is not "properly before" the Board. Because the "gravamen" of the First Nation's Appeal–its consultation claim--appears to be dependent on a determination of the validity of those rights, that claim is also not "properly before" the Board. Hence, this Appeal should be dismissed.

Dated on November 19, 1999, at Edmonton, Alberta.

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[31] See *Chem-Security (Alberta) Ltd. v. Alberta (Environmental Appeal Board)*, (1997) 56 Alta.L.R. (3d)(Alta. Q.B.) (recognizing the Board's position that its members are appointed for their "qualifications, abilities and experience" in the "environmental" field); *aff'd* (1996), (1996) Appeal No. 16947, Alta.C.A. But see *Okanagan Indian Band v. Deputy Comptroller of Water Rights* (1998), [1999] 3 C.N.L.R. 190 (B.C. E.A.B.) (B.C. Environmental Appeal Board concluding that it had jurisdiction to consider aboriginal law claims, in part, due to its expertise in determining factual issues generally).

Dr. William A. Tilleman