
ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – November 30, 2011

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF an appeal filed by Westridge Utilities Inc. with respect to *Water Act* Licence No. 00255373-00-00 issued to Rocky View County by the Director, Southern Region, Environmental Management, Alberta Environment.

Cite as: *Westridge Utilities Inc. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Rocky View County* (30 November 2011), Appeal No. 10-032-D (A.E.A.B.).

HEARING BEFORE:

Mr. Alex G. MacWilliam, Panel Chair;
Dr. Alan J. Kennedy, Board Member; and
Mr. Eric O. McAvity, Q.C., Board Member.

BOARD STAFF:

Mr. Gilbert Van Nes, General Counsel and
Settlement Officer; Ms. Denise Black, Board
Secretary; and Ms. Marian Fluker, Associate
Counsel.

SUBMISSIONS BY:

Westridge: Westridge Utilities Inc., represented by Mr.
John Gruber, President, Westridge Utilities
Inc.

Director: Mr. Brock Rush, Director, Southern Region,
Environmental Management, Alberta
Environment, represented by Ms. Charlene
Graham and Ms. Meagan Bryson, Alberta
Justice.

Rocky View: Rocky View County, represented by Ms.
Joanne Klauer, Mr. Dennis Yasui, Q.C., and
Mr. Rodney Smith, Brownlee LLP.

WITNESSES:

Westridge: Mr. John Gruber, President, Westridge
Utilities.

Rocky View: Mr. Bill Irvine, Senior Project Manager, Fossil
Water Incorporated; and Mr. Jorie McKenzie,
Project Delivery Technologist, Rocky View
County.

EXECUTIVE SUMMARY

Alberta Environment issued a Licence under the *Water Act* to Rocky View County authorizing the operation of works and the diversion of up to 277,533 cubic metres of water annually for municipal purposes. The point of diversion is from the Elbow River downstream of the point of diversion for Westridge Utilities Inc. The Licence is a transfer of part of an existing water licence issued to Allen's Trout Farm Inc.

The Board received a Notice of Appeal from Westridge objecting to the Licence transfer. The Board held a preliminary motions hearing to hear submissions on a number of preliminary matters.

Under section 95 of the *Environmental Protection and Enhancement Act*, the Board can set its own process and procedures. The Board's process in this appeal did not impact Westridge's right to a fair and just hearing of the preliminary matters.

The test for determining directly affected is as explained by the Court of Queen's Bench in *Court*. Westridge did not provide adequate arguments to support its argument that the Court of Appeal's decision in *Kelly* should be used in determining standing.

Westridge did not meet its onus of demonstrating to the Board, on a *prima facie* basis, that it was directly affected. Rocky View's Licence is non-consumptive so the amount of water in the Elbow River will not be impacted. If priority is called under water shortages, the Licence expressly provides that Rocky View cannot call priority against Westridge. Therefore, the Board found Westridge is not directly affected by the issuance of the Licence.

The Board, therefore, dismissed the appeal.

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	1
III.	SECTION 115(1)(R) OF THE <i>WATER ACT</i>	4
	A. Submissions	4
	B. Analysis	5
IV.	ONUS OF PROOF.....	7
	A. Submissions	7
	B. Analysis	9
V.	APPLICABILITY OF THE <i>KELLY CASE</i>	10
	A. Submissions	10
	B. Analysis	12
VI.	DIRECTLY AFFECTED.....	13
	A. Submissions	13
	B. Analysis	16
VII.	SUBSTANTIVE HEARING	22
	A. Submissions	22
	B. Analysis	23
VIII.	DECISION	24

I. INTRODUCTION

[1] Westridge Utilities Inc. (“Westridge”) and Rocky View County (“Rocky View”) both hold licences to withdraw water from the Elbow River. Allen’s Trout Farm Inc. (the “Trout Farm”) has a senior priority licence to withdraw water from a tributary of the same river. Alberta Environment authorized the Trout Farm to transfer part of its existing licence to Rocky View. Westridge filed an appeal objecting to the transfer of the right to divert water.

[2] This decision deals with a variety of preliminary and procedural issues about Westridge’s appeal. Most significantly, to sustain such an appeal under section 115(1)(r) of the *Water Act*, Westridge must be “directly affected” by the water licence in question. Westridge’s source of water is upstream of the Trout Farm and Rocky View’s withdrawal point. The Environmental Appeals Board (the “Board”) finds the transfer of part of the existing Trout Farm licence cannot have a negative impact on Westridge’s rights, or on the Elbow River, and Westridge lacks the status to maintain the appeal.

II. BACKGROUND

[3] The *Water Act*, R.S.A. 2000, c. W-3, includes a licensing system to regulate the use of surface water. In this case, such licences are issued by the Director, Southern Region, Environmental Management, Alberta Environment (the “Director”).

[4] On October 29, 2010, the Director issued Licence No. 00255373-00-00 (the “Licence”) to Rocky View authorizing the operation of a works and the diversion of up to 277,533 cubic metres of water annually at a maximum rate of diversion of 0.009 cubic metres per second from the Elbow River for municipal purposes. The point of diversion is on the Elbow River at NE 13-23-05-W5M in Rocky View County. The Licence is a transfer of part of an existing water licence issued to the Trout Farm. Such licencing decisions made by the Director can be appealed to the Board.

[5] On November 26, 2010, Westridge appealed the Licence. The Board then notified Westridge, Rocky View, and the Director (collectively the “Participants”), requested a

copy of the Director's records (the "Record"), and canvassed available dates for mediation or pre-hearing matters.

[6] On December 22, 2010, Rocky View asked for a preliminary motions hearing to determine if Westridge is directly affected and, if a hearing is held, to determine the issues.

[7] On February 10, 2011, the Board notified the Participants that, since no common dates were available for a preliminary motions hearing, the Board would proceed by written submissions unless it later found an oral preliminary motions hearing necessary.

[8] On February 22, 2011, the Board set the schedule to receive submissions on the following matters:

1. Is Westridge Utilities directly affected by *Water Act* Licence No. 00255373-00-00, as required under section 115(1)(r) of the *Water Act*?
2. Are grounds 1, 2, 3, 4, and 5 contained in Westridge Utilities' Notice of Appeal proper grounds of appeal?¹
3. Are there any other issues raised in the Notice of Appeal that are not properly before the Board?
4. What are the issues to be heard at a hearing of the appeal, should one be held?

¹ The Notice of Appeal raised the following grounds:

- "1. The purpose of the licence is being changed from non-consumptive to consumptive. No application for a change of purpose was considered or granted.
2. The point of diversion for the transfer is upstream of the point of Westridge points of diversion. Further, Westridge approvals are junior to the licence that is the subject of the transfer. As a result, in the event of a priority call, the transferee would be in a priority position to Westridge. This would cause the Company [Westridge] and its customers significant harm and inconvenience.
3. The Director, pursuant to section 53 of the *Water Act*, has declined to accept further applications for licences for the diversion of surface water on the premise that the subject basin has been fully allocated. The Decision subverts this moratorium on further surface diversion.
4. The Decision is otherwise contrary to the *Water Act*, the regulations thereunder, the South Saskatchewan River Basin Management Plan and the [Administrative Guideline for Transferring Water Allocations].
5. The Decision is arbitrary and discriminatory as it provides Rockyview County with [a] surface diversion of water that is unavailable to other potential licences as a result of the moratorium."

Westridge's initial submission was due March 11, 2011, Rocky View's and the Director's response submissions were due by March 25, 2011, and any rebuttal submission was due by April 18, 2011.

[9] On March 1, 2011, Westridge asked to delay its rebuttal until April 25, 2011. On March 2, 2011, the Board modified the dates to have response submissions due April 7, 2011, and Westridge's rebuttal submission due April 26, 2011.

[10] On March 11, 2011, Westridge objected to the procedure for receiving submissions and sought an oral preliminary motions hearing.

[11] On March 23, 2011, the Board set new deadlines requiring Westridge to file its initial submission by April 15, 2011, with responses due May 11, 2011, and any rebuttal due June 2, 2011. The Board posed the following questions:

1. Is the process that has been specified for receiving written submissions respecting these preliminary motions appropriate?
2. Is the process that has been specified for the oral preliminary motions hearing process as of March 23, 2011 appropriate?
3. Are there any concerns with the Board setting the preliminary issues to be considered as it has done in this case?
4. Are there any natural justice or procedural fairness concerns regarding the Board's process or procedure for addressing these preliminary motions?
5. Is Westridge directly affected by *Water Act* Licence No. 00255373-00-00, as required under section 115(1)(r) of the *Water Act*?
6. Are grounds 1, 2, 3, 4, and 5 contained in Westridge's Notice of Appeal proper grounds of appeal?
7. Are there any other issues raised in the Notice of Appeal that are not properly before the Board?
8. What are the issues to be heard at a hearing of the appeal, should one be held?

[12] On March 26, 2011, Westridge expressed concern that its time to provide its material was shortened by 11 days. The Board replied on March 28, 2011, noting Westridge's time to provide submissions was not shortened.

[13] Submissions were received between April 15, 2011 and June 2, 2011, and on June 14, 2011, the Board held an oral preliminary motions hearing in Calgary, Alberta.

III. Section 115(1)(r) of the *Water Act*

[14] The first issue the Board must decide is the proper interpretation of section 115(1)(r) of the *Water Act*. Section 115(1) of the *Water Act*, which includes section (r), specifies who has the right to file an appeal:

Notice of Appeal

115(1) A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:

- (r) if the Director approves or refuses a request for a transfer of an allocation of water, the applicant and any person who submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision.

A. Submissions

[15] Westridge's position is that, because it submitted a Statement of Concern and the Director accepted and acted upon it, Westridge is, by definition, a party and is entitled to appeal. Westridge argued no other proof is necessary beyond the Director's acceptance of the Statement of Concern.

[16] In addition, Westridge argued there is a presumption it has standing because it is a lower priority licensee pursuant to sections 30 and 82 of the *Water Act*, and it is recognized as a potentially affected party in the *Administrative Guidelines for Transferring Water Allocations* issued by Alberta Environment (the "Guidelines"). Westridge stated the Director is required, under section 109 of the *Water Act*, to conduct a preliminary assessment of the Statement of Concern and then conclude as to whether the person who submitted the Statement of Concern is directly affected. According to Westridge, it must be presumed the Director conducted an assessment of its Statement of Concern and considered the generally understood test for standing which the Board regularly applies.

[17] Westridge argued there is no difference in the standard for the directly affected test for the purpose of section 109 for filing a Statement of Concern than there is for section

115(c) for filing a Notice of Appeal under the *Water Act*. If a different test was to be applied, it could be achieved by altering the wording. Applying different standards or interpretations to the same phrase in the statute is at odds with basic principles of statutory interpretation, which require words be given their plain and ordinary meaning.

[18] Westridge argued that, if the Director recognizes a potential for a direct affect when assessing a Statement of Concern, it is difficult to conclude the direct affect somehow “vanishes” for the purpose of an appeal.

[19] Rocky View submitted that filing a Statement of Concern does not meet the requirements of demonstrating that a party has met the onus of establishing it is directly affected as required by section 115(1)(r) of the *Water Act*. The decision of the Director to allow a Statement of Concern is for a different purpose than the test for standing before the Board and, therefore, the Board is not bound by the Director’s decision on whether a party is directly affected.

[20] The Director took no position on the issue of the directly affected status of Westridge. The Director acknowledged he considered Westridge’s Statement of Concern as an official Statement of Concern, because Westridge held a licence within the Elbow River sub-basin where the transfer took place.

B. Analysis

[21] The Board interprets section 115(1)(r) of the *Water Act* to say it is a separate issue for the Board to determine if the appellant has a valid appeal. One step that is required is that a Statement of Concern was filed with the Director.

[22] The Director accepts Statements of Concern on a broader basis than the Board might accept a Notice of Appeal. The purpose of a Statement of Concern is twofold: (1) to notify the Director and the applicant of the Statement of Concern filer’s concerns; and (2) to reserve the Statement of Concern filer’s right to file an appeal. The Director uses the Statements of Concern to ensure issues are addressed in the approval or licence before it is issued, if one is

issued. As well, the project proponent has the opportunity to modify its project to mitigate the concerns submitted by the Statement of Concern filer.

[23] Westridge argued that if the Director finds a Statement of Concern is valid, then the direct affect found by the Director cannot “vanish” for the purpose of an appeal. One of the purposes of obtaining Statements of Concern is to allow the public to participate in the process at the early stages of the approval or licence application process. It brings issues to the Director’s attention in order for mitigative measures to be incorporated into the approval or licence and it allows the project proponent to modify its proposal to take such concerns into account. On this basis alone it is possible that a concern raised in the Statement of Concern is no longer an issue and the Statement of Concern filer is no longer directly affected.

[24] In many decisions that come before the Board, there have been more Statements of Concern filed than Notices of Appeal filed with the Board. One possible reason for this is that concerns have been addressed in the terms and conditions of the approval or licence, and the Statement of Concern filer has determined they are no longer directly affected. The concerns may have not “vanished,” but they have been addressed.

[25] Westridge argued the tests for directly affected are the same under sections 109 and 115 of the *Water Act*. The Board notes the requirement under section 115 is that Westridge must have filed a Statement of Concern *and* be directly affected. The argument being advanced by Westridge is the Board does not have to assess directly affected if the Director accepts the Statement of Concern. If that was the legislator’s intent, then the section would read “if a valid Statement of Concern was filed” and the directly affected element would not have been included. The legislation requires two steps to be met in order to file a valid Notice of Appeal. If Westridge’s argument is correct, then once you have been found to be directly affected by the Director when he or she accepts the Statement of Concern, then the two requirements as stated in section 115, filing a Statement of Concern and being directly affected, would be redundant. Therefore, the Board does not accept Westridge’s argument. Even if the Director accepts the Statement of Concern, this does not prove the filer is directly affected for the purposes of filing an appeal. There is no statutory right to require the Board to accept an appeal on the sole basis of the Director accepting a Statement of Concern. The Board has acknowledged in previous

decisions that the decision-making function of the Director and the appellate function of the Board are different. The purpose of Statements of Concern is to allow the Director to collect information regarding the concerns of potentially affected parties to assist him in making a decision. Therefore, it is appropriate for the Director to be more inclusive in determining who is directly affected.²

[26] Based on this, section 115(1)(r) does not give an automatic right of appeal. The onus is on the appellant to show it is directly affected on a *prima facie* basis. The statute, the courts in *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.) (“*Court*”), and the Board’s practice have treated the determination of “directly affected” status as a preliminary matter.

IV. Onus of Proof

A. Submissions

[27] Westridge’s second argument was that, even if there is not an automatic right of appeal, the onus is on the Director and Rocky View to establish Westridge is not directly affected. Westridge argued the Board’s process was unfair, placing the onus on Westridge rather than on Rocky View, who raised the directly affected motion, and the Director.

[28] Westridge argued that, by virtue of its lower priority licences and its inclusion in the class of persons recognized by the *Water Act* and the Guidelines, it is presumed to have standing to file an appeal. Westridge argued that, based on the principles established by the Alberta Court of Appeal in *Kelly v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 349 (“*Kelly*”), it is not required to assert a positive case with respect to standing until evidence has been tendered that suggests otherwise.

[29] Westridge stated it is a party that was previously recognized as being directly affected by the Director’s decision and, therefore, *prima facie* it has standing, subject to the ability of Rocky View or the Director to demonstrate otherwise. Westridge noted the Director

² See: *Ouimet et al. v. Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment*, re: *Ouellette Packers (2000) Ltd.*

reversed his position with respect to standing and, therefore, it is appropriate for the Director to bear the onus of explaining the factual and legal basis for the change in his position.

[30] Westridge argued the procedure set by the Board was not appropriate and puts Westridge at a disadvantage. Rocky View was the original applicant of the motion and Westridge was the respondent. Westridge noted no evidence or written submissions were filed in support of the motion. Westridge submitted it is normal procedure for the applicant of a motion to first file evidence and submissions that provide the basis for the relief sought, and then the respondent would have the opportunity to review the material and address it with its own submission and evidence. The requirement of having the respondent file submissions first suggests a presumption in favour of the relief sought by the proponent that must be overcome by the respondent. This offends the impartiality required by an administrative tribunal. Westridge noted there is no statutory provision that shifts the onus to a respondent in an application before the Board.

[31] Westridge summarized the Board's test for standing and stated that, if a party demonstrates there is a potential for harm resulting from the Director's decision, standing should be granted. Westridge stated there is a rebuttable presumption of standing where Westridge falls within a particular class or group, and in this circumstance, the onus rests on the parties challenging standing.

[32] In its rebuttal, Westridge argued that it is not required to prove on a balance of probabilities that it will be adversely affected by the Director's decision. It stated that, if that was the case, the Board would have decided the substance of the appeal.

[33] The Director and Rocky View submitted that, pursuant to section 95(8) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), the Board may, subject to the regulations, establish its own rules and procedures for dealing with matters before it. Rocky View stated the process for receiving written submissions does not contravene the requirements stipulated in section 10 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the "Regulation") or the Board's Rules of Practice.

[34] Rocky View submitted that, since Westridge has the onus of establishing it has standing, Westridge should bear the onus of filing the initial written submission. Westridge has the particular information to demonstrate it has standing, and it has the opportunity to provide a rebuttal submission. The Board's process relative to filing written submissions is fair and does not put Westridge at an unwarranted disadvantage.

[35] In addition, the Director submitted an alternate approach, where the party raising the motion provides the initial submission, would be fair and efficient for all parties involved. This approach would be consistent with the principles of procedural fairness and natural justice, and it would allow Westridge to know the case against it and it would have the opportunity to respond to that specific case. The Director noted that, if Westridge is required to make the initial submission, Westridge must split its argument. In its rebuttal, Westridge agreed with the Director's comments. Westridge stated the bifurcation of its argument is not the product of an attempt to gain a procedural advantage, but it is a consequence of having to respond to arguments that have not yet been made. Westridge stated it is equivalent of having an appellant submit argument and evidence after the respondent has done so

[36] The Director stated that, typically at a hearing, the appellant goes first because they are the party bringing the appeal. The Director submitted the order of submissions should be consistent with this approach such that Rocky View would make the initial submission since it is the party bringing the motion. The Director did not dispute the onus is on Westridge to establish it is directly affected, but this did not necessarily mean Westridge should have to provide the initial submission to Rocky View's motion challenging its directly affected status.

B. Analysis

[37] The initial onus is on Westridge to establish, on a *prima facie* basis, that it is directly affected. Then, if this is established, the onus switches to the others to demonstrate Westridge is not directly affected.

[38] Westridge raised a number of procedural issues, specifically whether Westridge should be required to provide its submission and arguments first, before Rocky View who raised the motion of directly affected. Westridge argued the party raising the motion should provide the

initial submission, then the respondent, which is often the appellant in the Board's proceeding, provides a response submission, and then the applicant of the motion would provide a rebuttal submission. It has been the Board's practice, with respect to determining the directly affected status of an appellant, to have the appellant provide the initial submission, the other parties to then provide response submissions, and finally, to have the appellant provide a rebuttal submission. This process allows the appellant, who has the onus of demonstrating on a *prima facie* basis they are directly affected, the opportunity to provide a rebuttal submission. The Board views this to be a fair process given many appellants that appear before the Board are not represented. Even though the licence or approval holder or Director may have raised the preliminary motion, the Board has found that appellants are generally capable of providing arguments to validate their appeal. The appellant has the information available to demonstrate the appeal before the Board is valid. The Board has found giving the appellants the opportunity to provide both initial and rebuttal submissions affords them the most opportunities to show their appeal is valid. It is the appellant who has the most to lose since, if the appellant loses on a preliminary motion that relates to standing, the appeal is dismissed.

[39] The Board notes Westridge did not raise any concerns regarding the process until the date the initial submission was due. The schedule for providing submissions was provided to the Participants two and a half weeks before Westridge was to provide its submission. If there were concerns with the process, it should have been raised when the schedule was set. If Westridge had raised its concern regarding the process earlier, and if the other Participants agreed, the Board may have considered altering its process to accommodate Westridge's concerns.

V. Applicability of the *Kelly* Case

A. Submissions

[40] Westridge argued the decision in *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134, 2 Admin L.R. (4d) 71 (Alta. Q. B.) ("*Court*") needs to be revisited in light of the Court of Appeal decision in *Kelly v. Alberta*

(*Energy Resources Conservation Board*), 2009 ABCA 349 (“*Kelly*”). Westridge stated the governing legislation uses the same language for the test for standing, namely “direct affect.”

[41] Westridge stated the Court of Appeal in *Kelly* reviewed how the Energy Resources Conservation Board (“ERCB”) dealt with onus. The Court of Appeal indicated that, where standing is concerned, there are certain classes of parties who, by operation of the relevant statutes, regulations, or guidelines, are presumed to be directly affected, and this presumption can be rebutted by evidence.

[42] Rocky View argued the *Kelly* case is distinguishable from the present case for the following reasons:

1. *Kelly* applies to the ERCB, not this Board. The ERCB is governed by a different statute than this Board and employs a different process for hearing appeals. The test for the ERCB is whether a party is directly and adversely affected.
2. *Kelly* is not inconsistent with the *Court* decision or this Board’s practice. The Court of Appeal in *Kelly* found the onus was originally on the appellants to establish they lived in the protective action zone and once they had done so, they had given enough evidence they were potentially adversely affected. This is the same onus as elaborated in the *Court* decision which held the appellant must show on a *prima facie* basis that he or she is directly affected, and if established, the respondents can rebut it. The decision in *Court* continues to be applicable authority for this Board to assess standing.

[43] In its rebuttal, Westridge submitted the reasons stated by Rocky View to distinguish *Kelly* do not render *Kelly* inapplicable to the present motion. Westridge argued that no materiality attaches to the fact it is two different administrative bodies, and there is no material difference in the statutory tests for standing. Westridge noted that neither the ERCB nor the Board permit just any member of the public to intervene in the proceedings and that each requires the person to meet a test for standing. Westridge noted the ERCB grants standing to a party who is potentially “directly and adversely affected” whereas the *Water Act* uses the term “directly affected.” Westridge argued the requirement in section 115 of the *Water Act* can only

be read as directly and adversely affected since, if a person who is positively affected filed an appeal, the decision which renders a positive effect on him could be set aside.

[44] Westridge stated that, if the *Kelly* decision is consistent with the *Court* decision as asserted by Rocky View, then Westridge met the test since it is an “other licensee” as the term is used in section 82 of the *Water Act*. Westridge stated it has demonstrated it is a lower priority licensee and its point of diversion is downstream of the actual point of diversion of the Licence. Westridge stated it is within the category of persons recognized in the Guidelines issued by Alberta Environment. Westridge argued *Kelly* is not distinguishable and is binding authority on this motion. Westridge argued the *Kelly* decision is correct for this situation in that once Westridge was found to be within a class of persons identified in the directives issued by Alberta Environment, there was recognition there was the potential for harm and the presumption of standing existed.

B. Analysis

[45] Westridge argued the Board should consider the Court of Appeal decision in *Kelly*, not *Court*, to determine standing and the onus of finding an appellant directly affected. The *Kelly* decision considered the issue of standing before the ERCB while *Court* gave guidance regarding standing before this Board. There are differences between the ERCB and this Board. This Board is an appellate Board that hears appeals of certain decisions made by the Director who is the initial decision-maker under the *Water Act* in this case. The ERCB is the initial decision maker under its legislation. Although there is a reconsideration mechanism at the ERCB, the decision in *Kelly* was with respect to standing before the ERCB as part of the initial decision making. If compared to the approval process in this case, it would be similar to the Director making a decision on whether a Statement of Concern filer is directly affected.

[46] The *Kelly* decision is not inconsistent with the *Court* decision. In both types of cases considered by the courts, the onus is on the appellant to demonstrate, on a *prima facie* basis, they are directly affected by the decision made. If the appellant meets the onus, the onus then switches to the project proponent to rebut the argument.

[47] In *Kelly*, it is important to note the determination of who is directly affected is prescribed in the ERCB's directives.³ In the directives, the ERCB identifies those who are considered directly affected by a proposed project. The issue came before the Courts when, at the hearing, the ERCB did not apply its own policy and narrowly interpreted its policy to limit those who could appear before it. These directives are not relevant to this Board. This Board does not have a policy or directive to determine who is directly affected. Although the Board has developed guidelines within its decisions regarding the issue of directly affected, the actual determination is based upon case specific circumstances and the legislation.

[48] The Board does not accept Westridge's argument that *Kelly* should apply to this Board. The Board will apply the test as described in the *Court* decision to determine whether Westridge has standing.

VI. Directly Affected

A. Submissions

[49] Westridge noted there is no provision in the *Water Act* that provides for the modification of priority under section 30, and if there is a conflict between the priority ascribed in section 30 and the Licence, the *Water Act* prevails. The *Water Act* provides that a higher priority licence prevails over a lower priority licence, and a party with no priority can purchase priority over an existing licence. Westridge argued it seems illogical to suggest a holder of a lower priority licence is not affected. Westridge noted section 82(3) of the *Water Act* precludes a transfer if such a transfer will adversely affect an "other licensee," and the Director has no discretion to approve a transfer where there is an impairment of the rights of other licensees.

[50] Westridge argued that, under the test for standing articulated by *Rocky View*, should the Board determine a licensee is directly, and necessarily adversely affected on a standing motion, the hearing of the appeal would be *res judicata*. Westridge stated a decision by the Board to uphold the Director's decision would be irreconcilable with the earlier decision

³ See: ERCB Directive 056 Energy Development Applications and Schedules, and ERCB Directive 071 Emergency Preparedness and Response Requirements for the Petroleum Industry.

granting standing given the provisions of section 82(3)(b). Westridge submitted the issue on a standing motion is whether Westridge is within a class of persons capable of being adversely affected by a decision of the Director.

[51] Westridge argued it has standing because it holds licences junior to the Licence issued to Rocky View, and its point of diversion is downstream of the actual point of diversion of the Licence. Westridge noted the *Water Act* and the Guidelines specifically reference “other licensees” as entities impacted by the transfer of licensed diversion allocations. Westridge stated that it appeared certain conditions in the Licence were included in an attempt to alleviate Westridge’s concerns. It argued that, if that is a reasonable presumption, it is difficult to conclude that Westridge is not directly affected. Westridge noted the question of whether the measures incorporated in the Licence are sufficient to deal with Westridge’s concerns is a matter for the substantive hearing.

[52] Westridge argued a party with standing is entitled to examine whether the decision appealed is in accordance with the governing legislation.

[53] Rocky View and the Director submitted Westridge is not directly affected for the following reasons:

1. The Licence remains a non-consumptive or no net loss licence, even though the purpose was changed to municipal purposes. The original licence held by the Trout Farm was a non-consumptive licence, and the terms of the Licence require it to remain non-consumptive. The total volume of water diverted will be returned to the Elbow River. This ensures the status quo to the river and its users is maintained.
2. The status quo is maintained in regards to priority so Westridge’s licences will not be impacted. The Licence moved the point of diversion further upstream on the main stem of the Elbow River. Section 87(7)b(i) of the *Water Act* requires the Licence to have the same priority number as the licence from which the allocation was transferred. If Rocky View could call priority at the new point of diversion, this would “reorder” the priority call list on the Elbow River and cause impacts to

the other priority holders. The terms of the Licence require that, in the event of an administration of priority, priority of the Licence will be at the original point of diversion at SE 5-24-2-W5M, which is a tributary of Lott Creek. Lott Creek flows into the Elbow River downstream of Westridge's licences. If there is an administration of priority, the Licence requires Rocky View to stop all diversion on the Elbow River until water demands are met downstream. Rocky View will not be able to call priority at the new upstream point of diversion or on the Elbow River. Therefore, there is no change in how priority will be administered in the sub-basin and the status quo is maintained.

3. The rate of diversion allowed in the Licence is 10 percent less than the diversion rate authorized in the licence from which the water allocation was transferred. This holdback will benefit the Elbow River by protecting the aquatic environment.

[54] Rocky View noted the *Water Act* requires that a notice of appeal be submitted by either the applicant or a person who is directly affected by the transfer. Rocky View stated the *Court* case reaffirmed the issue of standing is a preliminary issue to be determined before the merits of the appeal are decided, and the onus is on Westridge to establish, on a balance of probabilities, the Director's decision will have a direct affect on Westridge's interests and the affect will be actual or imminent and not speculative.

[55] Rocky View submitted Westridge had not proven that it is directly affected by the Licence, and it had not demonstrated the Licence would harm a natural resource Westridge uses or harm Westridge's use of a natural resource. Rocky View stated the Licence would not affect Westridge because nothing substantively changes with the Licence, and Westridge is in the same position after the granting of the Licence as it was prior to the Licence being granted.

[56] The Director noted the Board has the authority pursuant to section 95(5)(a)(ii) of EPEA to determine whether or not Westridge is directly affected and accordingly dismiss the appeal if Westridge is not found to be directly affected.

[57] Rocky View and the Director did not agree with Westridge's argument that the Director's decision to issue the Licence was arbitrary and discriminatory. They noted that, under the *Bow, Oldman and South Saskatchewan River Basin Water Allocation Order*, Alta. Reg. 171/2007 (the "Order"), no new licences can be granted in these sub-basins, unless they fall into one of the exceptions set out in the Order. One way to obtain an allocation of water in these basins is through a transfer whereby new or existing users may obtain existing water licences from existing licence holders. Anyone, including Westridge, can apply for a water transfer pursuant to the provisions of the *Water Act* so it has not been discriminated against. Therefore, if Westridge found an existing licence holder willing to transfer all or part of their allocation, Westridge could apply for a transfer of that licence.

B. Analysis

[58] The Board has discussed the issue of "directly affected" in numerous prior decisions. The Board received guidance on this issue from the Court of Queen's Bench in *Court*.

[59] In the *Court* decision, Justice McIntyre summarized the following principles regarding standing before the Board.

"First, the issue of standing is a preliminary issue to be decided before the merits are decided. See *Re: Bildson*, [1998] A.E.A.B. No. 33 at para. 4. ...

Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed. The appellant need not prove that the personal effects are unique or different from those of any other Albertan or even from those of any other user of the area in question. See *Bildson* at paras. 21-24. ...

Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the appellant will be able to make the requisite factual showing. See *Bildson* at para. 33:

What is 'extremely significant' is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant's use of a natural resource. The greater the proximity

between the location of the appellant's use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing. Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity. However, having a legal right that is injured by a project is not the only way in which an appellant can show a proximity between its use of resources and the project in question.

Fourth, the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the approved project. The appellant need only prove a potential or reasonable probability for harm. See *Mizera* at para. 26. In *Bildson* at para. 39, the Board stated:

[T]he 'preponderance of evidence' standard applies to the appellant's burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a 'potential' or 'reasonable probability' for harm. The Board believes that the Department's submission to the [A]EUB, together with Mr. Bildson's own letters to the [A]EUB and to the Department, make a prima facie showing of a potential harm to the area's wildlife and water resources, both of which Mr. Bildson uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson's factual proof.

In *Re: Vetsch*, [1996] A.E.A.B.D. No. 10 at para. 20, the Board ruled:

While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated.”⁴

⁴ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.). See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (19 October 1998), Appeal No. 98-

Justice McIntyre concluded by stating:

“To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is ‘directly affected’ by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted....”⁵

[60] In determining whether a person has standing to bring forward an appeal, the Board relies on the principles articulated in the *Court* decision. The onus is on the appellant to demonstrate to the Board there is a reasonable possibility they will be directly affected by the decision of the Director. The effect must be plausible and relevant to the Board’s jurisdiction in order for the Board to consider it sufficient to grant standing. The Board looks at how the appellant uses the area where the project will be located, how the project will affect the environment, and how the effect on the environment will affect the appellant’s use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected. The onus is on the appellant to present a *prima facie* case that he or she is directly affected.⁶

[61] At this point of the appeal process, the Board does not have all of the evidence and arguments that might be submitted during a hearing on the merits. As stated in *Court*, the determination of directly affected is a preliminary matter. As a result, the test for standing cannot be based on whether there is certainty Westridge is directly affected. Without all of the evidence, that cannot be determined. An appeal before the Board is a quasi-judicial process. The appeal process must adhere to the principles of natural justice and must be fair to all of the participants. The Board considers it appropriate that, in assessing preliminary matters, the

230-D (A.E.A.B.) (“*Bildson*”); *Mizera et al. v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection*, re: *Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D (A.E.A.B.) (“*Mizera*”); and *Vetsch v. Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al. v. Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal Nos. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.).

⁵ *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q.B.).

⁶ See: *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

standard should be less onerous than those found in a court. Therefore, the Board considers it appropriate that an appellant show, on a *prima facie* basis, there is a reasonable possibility they are directly affected by the Director's decision.

[62] As stated, the effect must be reasonable and possible. It is not sufficient to show an appellant is possibly affected, they must also show the possibility is reasonable. An affect that is too remote, speculative, or is not likely to impact the appellant's interests will not form the basis to find an appellant directly affected. Both the reasonableness and the possibility of the affect must be shown.

[63] The effect on the appellant does not have to be unique in kind or magnitude.⁷ However, the effect the Board is looking for needs to be more than an effect on the public at large (it must be personal and individual in nature), and the interest which the appellant is asserting as being affected must be something more than the generalized interest that all Albertans have in protecting the environment.⁸ Under EPEA, the Legislature chose to restrict the right of appeal to those who are directly affected by the Director's decision. If the Legislature had intended for any member of the public to be allowed to appeal, it could have used the phrase "any person" in describing who has the right to appeal. It did not; it chose to restrict the right of appeal to a more limited class. The Legislature, in using the more restrictive language, also did not intend for the Board to provide a general right of review for the Director's decision; it intended it to be something narrower.

[64] Westridge was correct in that it does not have to demonstrate on a balance of probabilities that it is directly affected by the Director's decision. What is required is to show on a *prima facie* basis Westridge is directly affected. This is where Westridge failed in its submissions before the Board. Even if Westridge had provided a *prima facie* case that it is directly affected, the presumption is rebuttable. In this case, Rocky View effectively rebutted

⁷ See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection re: Smoky River Coal Limited* (19 October 1998) Appeal No. 98-230-D (A.E.A.B.).

⁸ See: *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.). These passages are cited with approval in *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

any presumption of Westridge being directly affected. Westridge did not show how the Director's decision to issue the Licence would have a direct affect on Westridge.

[65] Based on the *Court* decision, Westridge must demonstrate there is a reasonable possibility that it is directly affected by the Director's decision to issue the Licence. Westridge did not provide any arguments to show how it would be directly affected based on the test presented in *Court*. Instead, its arguments were based on the premise it belonged to a group that was identified in the policies that had to be taken into consideration when issuing a licence. The Director considered the potential impacts on Westridge and, as a result, issued the Licence with the priority location the same as the Trout Farm licence. Even though Westridge was included in the group that had to be considered by the Director when determining whether a licence should be granted, the system established under the legislation providing for appeals to the Board has no identifiable groups or classes that can file appeals with the possible exception of approval or licence holders and landowners when dealing with reclamation certificates.

[66] The Board has stated in many of its previous decisions on standing that there must be a direct connection between the Director's decision and the effect on the appellant. The closer the nexus, the greater the likelihood of being found directly affected. In this case, the Licence requires "no net loss" to the Elbow River. The total volume of water diverted from the Elbow River must be returned to the river. Any deficit from what Rocky View takes out and what is returned must be compensated for from external water sources. The Licence is not a new licence but is a transfer of a portion of an existing licence. No water, over and above what is allowed under the Trout Farm licence, may be withdrawn from the Elbow River. Therefore, there will be no effect on the water levels in the Elbow River from what currently occurs under the Trout Farm licence, except for the 10 percent holdback, which has the affect of increasing the amount of water in the river.

[67] Westridge holds *Water Act* licences on the Elbow River downstream from where Rocky View will withdraw water under the Licence. Westridge's licences are junior to Rocky View's Licence, which would be, in most circumstances, an issue if Rocky View called a priority. However, both the priority number of the Trout Farm licence and the location of the water diversion of the Trout Farm licence apply to the Licence. Therefore, if Rocky View called

a priority, it would be applied to upstream users on Lott Creek only, not those on the Elbow River. It is not possible for Rocky View to call priority on Westridge. Rocky View cannot make a priority call on any other licensee on the Elbow River based on the administration of the Licence on Lott Creek.⁹ If the priority applied to the site where the water will be withdrawn, then the circumstances would be different. A priority could be called against Westridge, and it could be directly affected by the Licence. However, given the conditions of the Licence and the location where priority could be called, Westridge has not demonstrated there is a reasonable possibility that it is directly affected. Therefore, the Board finds Westridge is not directly affected.

[68] Westridge argued the Licence can be amended in such a way as to affect its rights. In this appeal, the Board must assess whether the Licence, as currently in effect, would directly affect Westridge. It is speculation on Westridge's part that the Licence will be amended in the future. Rocky View made no indication it anticipates applying for amendments. Even if Rocky View does want to amend the Licence, it will have to apply to the Director. This would initiate the public Statement of Concern process, and Westridge would be given an opportunity to file a Statement of Concern. There would also be an opportunity to appeal a decision allowing an amendment. In other words, if there is an amendment in the future, Westridge would have an opportunity to ensure its concerns are considered, assuming it meets the requirements in the legislation.

[69] Westridge referred to Condition 3.19 of the Licence and the Water Balance and Implementation Plan and argued that statements of intent by the project proponent are not determinative. Rocky View must provide the Water Balance and Implementation Plan and it must meet the no net loss requirement of the Licence. The Water Balance and Implementation Plan will set out the manner in which Rocky View intends to meet the no net loss requirement of the Licence. If Rocky View cannot meet that requirement, the Director can take enforcement action or revoke the Licence. Westridge is speculating the Water Balance and Implementation Plan will not address the no net loss condition. The Board cannot base standing on speculation.

⁹ See Appendix A of map indicating the licences held on the Elbow River and Lott Creek, including the Fish Farm, Rocky View, and Westridge.

[70] The Board does not believe Westridge is prejudiced by the Licence. Westridge could have negotiated an agreement with the Trout Farm or any other party willing to transfer water under an existing licence. Therefore, this point does not support Westridge's directly affected arguments.

[71] The Board finds Westridge is not directly affected and, accordingly, the appeal is dismissed.

VII. Substantive Hearing

A. Submissions

[72] Westridge argued that it is a common feature of administrative proceedings in this province that parties, who, by virtue of statute, regulation, or directive, are within a directly affected class of persons, are entitled to standing in order to test the competency of the measures designed to mitigate the potential affect on them.

[73] Westridge stated there is a genuine issue as to whether Condition 4.1 of the Licence is consistent with the priority system set out in the *Water Act* and whether the Licence will be a withdrawal from the South Saskatchewan River Basin in contravention of the moratorium. Westridge stated it is not clear that Condition 4.1 of the Licence¹⁰ is capable of superseding the statutorily enshrined priority system in section 30 of the *Water Act*. In addition, Westridge referred to section 32(1) of the *Water Act* that permits administration of priority in the event of a dispute with respect to the order in which the water is to be diverted. It submitted the administration of priority is determined by priority number, and its licences are junior to the Licence. Westridge stated it could be argued by Rocky View the precondition to Condition 4.1 of the Licence, namely a bona fide dispute as to the order in which the water is to be diverted, does not exist due to the clear seniority of the Licence, thereby voiding Condition 4.1.

¹⁰ Condition 4.1 of the Licence states:

“In the event of administration of priority, priority will be administered at the original point of diversion located on a spring tributary of Lott Creek in Lot 1, Block 1, Plan 8910799, SE 05-024-02-W5M.”

[74] Westridge noted the *Water Act* allows for water diversion licences to be amended, and there is nothing preventing Rocky View from applying to eliminate Condition 4.1 from the Licence. Westridge stated it is not unreasonable to assume that, should events dictate, Rocky View would seek any amendment necessary to provide for the needs of its constituents. Westridge stated such an amendment would be detrimental to its interests and its customers.

[75] Westridge submitted statements of future intent by Rocky View are not determinative since every project proponent will assert there are no adverse consequences associated with their project. Westridge argued those parties who would be negatively impacted, if the assertions are inaccurate, are entitled to test them in a hearing. Westridge noted the Water Balance and Implementation Plan had not been submitted to the Director, and it is the efficacy of this plan that will determine whether the Licence is non-consumptive or has no net loss to the river.

[76] Westridge argued that, while the conditions in the Licence that prohibit future harm or impairment may be sufficient to support the decision of the Director, they are not capable of depriving Westridge of the right to a hearing on the substantive issues. Westridge stated the benefits of the adversarial process are effectively neutralized if untested general statements of “no harm” by a proponent are sufficient to preclude further scrutiny.

B. Analysis

[77] The Director stated the preliminary matters could be determined through written submissions only. Rocky View agreed the Board had the authority to hold a written submission process only. However, as Westridge requested an oral Preliminary Motions Hearing, one was held.

[78] Westridge argued a decision by the Board to uphold the Director’s decision would be irreconcilable with the decision granting standing given the provisions of section 82(3)(b) of the *Water Act*. The Board does not agree. Even if the Board granted Westridge standing, it does not mean the Board is agreeing or disagreeing with the Director’s decision. A hearing before the Board is a *de novo* hearing. The hearing of the appeal is not *res judicata* since the Board has not made a decision or recommendations on the issues. Evidence and arguments are provided by the

parties, and some of the evidence may not have been before the Director at the time his decision was made. Depending on the evidence presented at a substantive hearing, the Board might find varying degrees of impact on an appellant who was found directly affected at the preliminary stages, from minimally impacted to severely impacted. The degree of impact would lead the Board to recommend the Director's decision be confirmed, reversed, or varied.

[79] As the Board has dismissed the appeal, the Board does not have to make a determination of the issues as no substantive hearing will be held.

VIII. DECISION

[80] The Board received submissions and heard evidence on eight questions at the Preliminary Motions Hearing. As discussed above, under section 95 of EPEA, the Board can set its own process and procedures. The Board's procedure did not prejudice Westridge, and Westridge was given a fair opportunity to provide its evidence and arguments.

[81] The test for determining directly affected is as explained by the Court of Queen's Bench in *Court*. Westridge did not provide adequate arguments to support its position that the Court of Appeal's decision in *Kelly* should be used in determining standing.

[82] Westridge did not meet its onus of demonstrating to the Board, on a *prima facie* basis, that it was directly affected. Rocky View's Licence is non-consumptive so the amount of water in the Elbow River will not be impacted. If priority is called under water shortages, Rocky View cannot call priority against Westridge.

[83] Therefore, the Board dismisses the appeal.

Dated on November 30, 2011, at Edmonton, Alberta.

“original signed by”

Mr. Alex G. MacWilliam
Panel Chair

“original signed by”

Dr. Alan J. Kennedy
Board Member

“original signed by”

Mr. Eric O. McAvity, Q.C.
Board Member