

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – July 3, 2019

**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** appeals filed by the Calgary River Forum Society with respect to *Water Act* Licence No. 00392661-00-00 issued to 1809668 Alberta Inc. and Licence Amendment No. 00027286-00-04 issued to Harvest Hills Golf Course Ltd. by the Director, South Saskatchewan Region, Alberta Environment and Parks.

Cite as: *Calgary River Forum Society v. Director, South Saskatchewan Region, Alberta Environment and Parks*, re: *Harvest Hills Golf Course Ltd. and 1809668 Alberta Inc.* (3 July 2019), Appeal Nos. 17-071 and 17-072-D (A.E.A.B.), 2019 ABEAB 23.



**PANEL MEMBER:**

Ms. Meg Barker, Panel Chair.

**PARTICIPANTS:**

**Appellant:**

Calgary River Forum Society.

**Licence Holders:**

1809668 Alberta Inc. (Licence No. 00392661-00-00) and Harvest Hills Golf Course Ltd. (Licence Amendment No. 00027286-00-04).

**Director:**

Mr. Brock Rush, Director, South Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Michelle Williamson, Alberta Justice and Solicitor General.

## **EXECUTIVE SUMMARY**

Alberta Environment and Parks (AEP) issued a Licence to 1809668 Alberta Inc. and a Licence Amendment to Harvest Hills Golf Course Ltd. The Licence authorizes the diversion of water from the Bow River for irrigation purposes. The Licence Amendment reduces the amount of water the Harvest Hills Golf Course Ltd. can withdraw annually from Nose Creek, in the City of Calgary, Alberta.

The Environmental Appeals Board (the Board) received appeals from the Calgary River Forum Society appealing both the Licence and the Licence Amendment. AEP asked the Board to dismiss the appeals on the grounds the Calgary River Forum Society was not directly affected by the decisions to issue the Licence and the Licence Amendment.

Following the review of written submissions from the Calgary River Forum Society, 1809668 Alberta Inc., and AEP, the Board determined the Calgary River Forum Society was not directly affected by AEP's decisions as it did not establish a potential or reasonable probability that its use of a natural resource would be harmed by the decisions. There was no indication the majority of its members of the Calgary River Forum Society would be directly impacted by the decisions to issue the Licence and Licence Amendment.

The Board dismissed the appeals on the basis the Calgary River Forum Society was not directly affected by AEP's decisions to issue the Licence and Licence Amendment.

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## **I. BACKGROUND**

[1] On February 6, 2018, the Director, South Saskatchewan Region, Alberta Environment and Parks (the “Director”), issued Licence No. 00392661-00-00 (the “Licence”) under the *Water Act*, R.S.A. 2000, c. W-3, to 1809668 Alberta Inc. (the “Licence Holder”) authorizing the diversion of up to 126,719 cubic metres of water annually from the Bow River for irrigation purposes. The Director also issued Licence Amendment No. 00027286-00-04 (the “Licence Amendment”) to Harvest Hills Golf Course Ltd. (the “Licence Amendment Holder”) reducing the allocation of water from 155,419 cubic metres annually to 14,621 cubic metres annually. The issuance of the Licence and the Licence Amendment were part of a water licence transfer arrangement.

[2] On March 8, 2018, the Environmental Appeals Board (the “Board”) received Notices of Appeal from the Calgary River Forum Society (the “Appellant”) appealing the Licence and Licence Amendment (collectively, the “Licences”).

[3] On March 15, 2018, the Board wrote to the Appellant, the Licence Holder, Licence Amendment Holder, and the Director (collectively, the “Participants”) acknowledging receipt of the Notices of Appeal and notifying the Licence Holder, Licence Amendment Holder, and the Director of the appeals. The Board also requested the Director provide the Board with a copy of the documents upon which his decisions were based relating to the appeals (the “Director’s Record”).

[4] On March 22, 2018, the Director requested the Board determine whether the Appellant has standing to appeal the decisions. The Director also provided a limited Director’s Record.

[5] On March 27, 2018, the Board set a schedule to receive submissions on whether the Appellant has standing to bring the appeals and whether the Appellant is directly affected by the issuance of the Licences.

[6] Submissions were received from the Participants between May 23, 2018, and June 20, 2018.

## **II. Submissions**

### **A. Appellant**

[7] The Appellant stated the determination of whether an individual or organization has standing should be made in conjunction with hearing the facts of the case, rather than as a preliminary matter. The Appellant believed it met the tests for personal and public interest standing since its appeals raised justiciable issues, the issues were serious, and it had a general interest in the issue.<sup>1</sup>

[8] The Appellant argued if it was denied standing, there would be no other way to bring the issues before the Board. The Appellant said preventing watershed stewardship groups, which are made up of citizens who value the environmental contributions of Calgary's waterbodies to the overall ecosystem, from having standing would violate the Board's mission to "... advance the protection, enhancement, and wise use of Alberta's environment by providing fair, impartial and efficient resolution of all matters before it." The Appellant argued the Board should not be limited to only hearing appeals filed by individuals whose private business interests, health, recreational activities, or personal enjoyment of their property is impacted by a decision made by the Director under the *Water Act*.

[9] The Appellant explained watershed stewardship groups were created and funded to provide opportunities for the public to be involved in policy development for the protection of, education about, and restoration of Alberta's environmental assets. The Appellant noted the Water for Life Strategy mandates involvement by informed citizens and community groups, and watershed stewardship groups are one of the groups that partners with the Government of Alberta. The Appellant argued watershed stewardship groups should have standing and should be considered directly affected.

[10] The Appellant stated it had the following three concerns with the decisions:

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<sup>1</sup> The Appellant referred to *Nova Scotia Censors v. McNeil*, [1976] 2 SCR 265, 1975 CanLII 14 (SCC); *Thorson v. Attorney General of Canada*, [1975] 1 SCR 138, 1974 CanLII 6(SCC); and *Minister of Justice of Canada v. Borowski*, [1981] 2 SCR 575, 1981 CanLII 34 (SCC).

1. Even though the majority of the water was approved for transfer to a location south of Calgary on the Bow River, the obligation to remove the unnecessary and non-functional weirs at the initial withdrawal point was only assigned to the owner of the small remainder portion of the water at the Harvest Hills location. The Licence Holder was assigned none of the responsibility for weir removal or creek remediation. The requirements to remove the weir and remediate the bed and shores of the creek should have been included as a condition in the Licence Amendment and the Licence.
2. There was no requirement for the removal of the large pump house even though the amount of water that would be drawn from Nose Creek under the Licence Amendment does not justify maintaining the pump house.
3. The new Licence was issued for new purposes at a new site on a different waterway and should have been given a new priority number.

[11] The Appellant explained it is a not-for-profit organization that has an advisory role in support of the stewardship of Calgary's rivers, valleys, creeks, and wetlands. The Appellant said it represents diverse interests including many individuals who live in river-edge and river-adjacent communities. The Appellant said its membership includes individuals, representatives from not-for-profit, environmental, and stewardship organizations, citizen advisory councils, and commercial and public education services who have an interest in the protection and management of Calgary's rivers, creeks, and watershed resources.

[12] The Appellant stated its members consider Calgary's watercourses to be their own rivers and creeks, and Nose Creek is a major amenity in the lives of the families, including some of its members, who live in communities adjacent to Nose Creek and near the site in question. The Appellant explained there are no residents who live directly adjacent to the location of the Licence Amendment, therefore it is important that watershed groups, such as the Appellant, raise issues that pertain to the public interest given it is mostly funded with public funds to represent the interests of those without the ability or opportunity to express their opinions and concerns. The Appellant said it represented the residential and business communities that will, in the future, have increased use of the creek area and should properly be considered the affected parties in the appeals.

[13] The Appellant stated one of the major reasons it exists is to participate in planning and policy issues that affect the river and river valleys. The Appellant said members of its



organization were involved in the development of many of the City of Calgary's policies that impact land use and water management in and around Calgary's creeks and rivers, including Nose Creek.

[14] The Appellant stated it continues to have a direct environmental interest in Nose Creek and activities in the Nose Creek corridor. The Appellant said it and its members have provided environmental educational tours of the Nose Creek watershed, conducted weekly water quality testing of Nose Creek, ensured aquatic ecosystems are kept healthy or improved wherever possible, and provided representation on stakeholder committees.

[15] The Appellant explained its membership includes hikers, cyclists, birders, fishers, and naturalists, and this area of the Nose Creek corridor could potentially be a valuable area to its members and all Albertans, provided the creek bed, banks, and shores are properly remediated now that the weirs are no longer required.

[16] The Appellant noted access issues prevent some of the user groups in its organization from easily accessing the site at this time, but the City of Calgary planning documents for the creek corridor indicate pathway access will occur in the future.

[17] The Appellant argued the decision to grant the Licence without including additional conditions to protect Nose Creek will cause significant harm. The Appellant noted the Licence included a condition requiring the removal of the in-stream weirs, but no conditions were included to address:

- removal of the large pump house on the site as it is no longer required for the 6-acre feet allocation at that site;
- remediation of the creek bed, bank, and shores once the weirs are removed;
- a requirement that the Licence Holder and Licence Amendment Holder be responsible for the removal of the weirs and the remediation of the site;
- a remedy in case the Licence Holder or Licence Amendment Holder fails to remove the weirs within the specified time frame; and
- a new priority number for the Licence rather than the original licence priority number.

[18] The Appellant stated the failure to ensure sufficient conditions were included in the Licences was likely to cause long-term harm to Nose Creek.

[19] The Appellant noted the following issues were of concern to its organization:

- the bed, banks, and shores of Nose Creek will continue to show impacts of having the weirs installed in-stream;
- taxpayers will be required to pay to remediate the bed, banks, and shores given no requirement was made of the industrial user (Licence Holder); and
- government funds that could be used for other restoration and remediation projects would be allocated to repair the damage to Nose Creek and adjacent lands caused by the Licence Amendment Holder, causing other projects which would positively impact water quality, fisheries, and the aquatic ecosystem to be deferred or cancelled.

**B. Licence Holder**

[20] The Licence Holder stated the transfer application met all of the requirements of the *Water Act*, and proper consideration and due process was exercised by the Director. The Licence Holder said the Director reviewed the submissions by the Appellant, and submitted it failed to show how the Appellant was directly affected. The Licence Holder believed the reasonable concerns of the Appellant were adequately addressed.

[21] The Licence Holder stated the broad mission of the Appellant did not justify finding a direct affect and, therefore, the Appellant did not sufficiently establish how it was a person directly affected by the Director's decision and, therefore, it did not have standing to bring the appeals.

**C. Director**

[22] The Director stated the public interest cases referenced by the Appellant do not apply when the statute specifies the test for standing is whether a person is "directly affected."

[23] The Director noted the Alberta Court of Queen’s Bench specifically ruled the Board has no jurisdiction to apply the public interest standing test, and the test the Board must apply is whether a person is “directly affected.”<sup>2</sup>

[24] The Director noted the test for “directly affected” involves two elements: (1) the decision must have an effect on the person; and (2) the effect must be direct.

[25] The Director said the Appellant described four areas to support its claim it is directly affected: (1) organizational mandate; (2) organizational interests specific to Nose Creek including its role in developing City policies; (3) its environmental interest in Nose Creek including education and water testing; and (4) its recreational interest in Nose Creek.

[26] The Director stated these activities and interests did not establish a sufficient nexus between the Licences, their effect, and a personal interest being impacted. The Director said the organizational, policy, environmental, or recreational interests of the Appellant were too generalized to be the basis for a directly affected finding.

[27] The Director stated the harm the Appellant asserted was too general and remote from the Licences to be considered a direct effect. The Director said the Appellant’s concerns were speculative as one of the Licences includes an obligation to remove existing infrastructure, and only if the licensee fails to uphold this obligation, and the Director took no further action to enforce the obligation, would the potential harm materialize.

[28] The Director noted the Appellant did not provide addresses of individual members to allow the Board to determine if their personal interests are directly affected. The Director noted some of the members appeared to be other organizations or councils, which do not themselves have a personal interest.

[29] The Director stated the Alberta courts have rejected the argument that because no individual members reside directly adjacent to the location covered by the licence, a group such as the Appellant should be given standing.

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<sup>2</sup> See: *Alberta Wilderness Association v. Alberta (Environmental Appeal Board)*, 2013 ABQA 44.

[30] The Director stated the Appellant did not meet the test for granting standing to a group because it did not establish that more than half of its members were directly affected by the Licences.

[31] The Director addressed some of the concerns raised by the Appellant:

1. The *Water Act* provides no discretion regarding priority numbers of new licences. In the transfer process, the new licence must be given the same priority number as the licence from which the allocation was transferred.
2. It is sufficient to impose the obligation to remove existing infrastructure on one licensee. That obligation does not have to be shared with the new licensee.
3. The Department does not have the responsibility to determine the appropriate size of the pump house since the in-stream objectives can be met with the existing pump house.

#### **D. Appellant's Rebuttal**

[32] The Appellant argued it is not possible to determine who may be directly affected without first hearing the merits of the appeal. Only then will the Board be able to determine obvious and reasonably possible impacts.

[33] The Appellant referred to a British Columbia Supreme Court decision where the Court held the British Columbia Environmental Appeals Board applied the “balance of probabilities” standard of proof to the question of standing. The Court said that standard was too rigorous and the appellants should only have had to demonstrate on a *prima facie* basis that they were “directly affected” when standing was decided as a preliminary matter.<sup>3</sup>

[34] The Appellant stated that, if public interest standing does not apply, this does not mean: (1) the public interest should not be served by the Board; (2) the Director and the Board should not consider the public interest in their decisions; and (3) the issue of public interest does not directly affect appellants such as it.

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<sup>3</sup> See: *Gagne v. Sharpe*, [2014] BCSC 2011.

[35] The Appellant said matters affecting it also affect the public interest, and it is imperative the public interest be considered by the Board. The Appellant stated the merits of the case need to be looked at in order to determine who is truly an affected party.

[36] The Appellant explained its organization is made up of concerned citizens with a general interest in decisions, such as the one made by the Director, impacting all water bodies in Calgary as well as specific interests in Nose Creek. The Appellant stated its generalized interests are made up of several components, and having a broad mandate and mission should not be held against it when determining if it has directly affected status.

[37] The Appellant said the issue is not the splitting of water rights and issuing the Licences in general, but it is whether the conditions in the Licences are adequate to address reasonably foreseeable possibilities related to the removal of the concrete weirs from the creek, the removal of the pump house, and the restoration of the creek at the weirs and in-stream pond location.

[38] The Appellant stated its individual members must be regarded as one group of concerned citizens who are interested in ensuring lawful processes are followed in decisions made under the *Water Act* and that Crown assets are properly protected. The Appellant said it is treated as a single entity or person under the law.

[39] The Appellant argued the requirement that a majority of a group or organization must be directly and personally impacted should not apply to an organization or community where a majority of the residents or members live outside an arbitrary setback from the site or the operations occur over a relatively large area. The Appellant specifically noted such organization or communities could include a First Nation of a medium to large size, an unincorporated Metis settlement, any other multi-person community, a large corporation with many shareholders, a guiding business, or a logging operation.

[40] The Appellant said the Director's argument that the Appellant, as an organization, has no physical existence seemed disingenuous, given it represents, and includes, actual persons.

[41] The Appellant argued there are elements to being directly affected that are not related to physicality, including being directly affected financially, spiritually, and operationally.

The Appellant questioned how it could not be directly affected if its reasons for being are affected or at risk. The Appellant argued that directly affected status does not only apply to where a person lives, but to the location where a person works, recreates, obtains food, and finds spiritual essence.

[42] The Appellant believed it was unnecessary to provide addresses related to its members, but noted its physical office location is in the Nose Creek watershed, approximately 350 metres from the channelized creek and about 6000 metres downstream from the Nose Creek weir site. The Appellant stated Nose Creek is the regional watercourse that provides a wildlife corridor as well as fishing and other recreational opportunities.

[43] The Appellant stated that although the Director thoroughly addressed some issues, other issues remain outstanding and are the subject of the appeals. The Appellant said it was told by the Licence Amendment Holder that it did not intend to remove the weirs or restore the damage it did to Nose Creek. The Appellant stated it was through its efforts and meetings with the Director and the Licence Amendment Holder that it was able to negotiate a condition in the Licence Amendment requiring the removal of the weirs.

[44] The Appellant explained its concern regarding the pump house was the fact there was no provision in either of the Licences requiring the maintenance and eventual removal of the pump house infrastructure and restoration of the site after the infrastructure is removed.

[45] The Appellant said all potential impacts are speculative by definition, so the reasonable potential harm should be considered as well as what options and conditions are available to address or prevent the harm.

[46] The Appellant argued that, without conditions requiring the maintenance and ultimate removal of the pump house and associated infrastructure and restoration of the site, further harm could result.

[47] The Appellant noted that, if the obligation to remove the weirs and remediate the area is attached only to the licensee holding rights to six acre feet per year, the value of the Licence Amendment may not be sufficient to shoulder the cost of removing the weirs and completing the remediation, thereby risking taxpayer funds to pay for the remediation. The

Appellant believed there is a risk the weirs will not be removed or the funds that may have been assigned to the Nose Creek watershed for other restoration projects would have to be diverted to the removal of the weirs and remediation of that area.

[48] The Appellant stated the same concerns apply should the Licence Amendment Holder be expected to have the sole responsibility for removing other infrastructure, such as the pump house, piping, and rip rap when it is no longer required. The Appellant believed the removal of the infrastructure would more likely occur if the conditions were attached to both Licences rather than just the Licence Amendment.

[49] The Appellant stated it is not possible for the Board to determine which appellants are directly affected without hearing the case on its merits to determine the obvious and reasonably potential impacts.

[50] The Appellant submitted it met the test for being directly affected and should be allowed to bring its concerns before the Board.

### **III. Analysis**

#### **A. Court and Board Analysis of Directly Affected**

[51] Before the Board can accept a Notice of Appeal as being valid, the person filing the appeal must show that he, she or it is directly affected by the Director's decision.<sup>4</sup> The Board

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<sup>4</sup> Section 115(1)(c) of the *Water Act* states:

“A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances...:

- (c) if a preliminary certificate has not been issued with respect to a licence and the Director issues or amends a licence, a notice of appeal may be submitted
  - (i) by the licensee or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108, or
  - (ii) by the licensee or by any person who is directly affected by the Director's decision, if the Director waived the requirement to provide notice under section 108(6) and notice of the application or proposed changes was not provided....”

has considered the term “directly affected” in a number of previous appeals and has developed a framework to determine if appellants should be given standing to appear before this Board. Although this framework is in place, the Board recognizes there must be some flexibility in determining who is directly affected, and it will be governed by the particular circumstances of each case.<sup>5</sup>

[52] The Board received guidance on the issue of “directly affected” from the Court of Queen’s Bench 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*”).

[53] 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

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<sup>5</sup> See: *Fred J. Wessley v. Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 94-001 (A.E.A.B.).



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.”<sup>6</sup>

Justice McIntyre concluded by stating:

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<sup>6</sup> *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 also: *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.) (“*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*

“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....”<sup>7</sup>

The Board notes Justice McIntyre’s decision in *Court*, responds directly to many of the arguments advanced by the Appellant, including the argument that standing should be decided on a *prima facie* basis.

[54] When assessing the directly affected status of an appellant, the Board looks at how the appellant will be individually and personally affected. The more ways in which the appellant is affected, the greater the likelihood of finding that person directly affected. The Board also looks at how the person uses the area, how the project that is the subject of the appeal will affect the environment, and how the effect on the environment will impact the person’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.<sup>8</sup>

[55] The Court of Queen’s Bench in *Court*<sup>9</sup> stated an appellant only needs to show there is a potential for an effect on that person’s interests. This potential effect must still be reasonable, plausible, and relevant to the Board’s jurisdiction for the Board to consider it sufficient to grant standing. An effect that is too remote, speculative, or is not likely to impact the appellant’s interests will not support a finding that an appellant is directly affected. Both the reasonableness and the possibility of the effect must be shown. The effect on the appellant does not have to be unique in kind or magnitude.<sup>10</sup> However, the effect the Board is looking for needs

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*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.).

<sup>7</sup> *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q.B.).

<sup>8</sup> 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.).

<sup>9</sup> *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.).

<sup>10</sup> 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.).

to be more than an effect on the public at large. It must be personal and individual in nature, and it must be something more than the generalized interest that all Albertans have in protecting the environment.<sup>11</sup> Under the *Water Act*, 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. Instead it chose to restrict the right of appeal to a more limited class.

[56] The Board applies this basic framework in assessing whether a person, group, or organization is directly affected. The Board does not make a distinction between the right of an individual to appeal or the right of a group or organization to appeal. However, different information is required when a group or organization files a Notice of Appeal in order for the Board to determine if it is directly affected.

[57] Two prior decisions of the Board are relevant to the issue of whether a group is directly affected - *Hazeldean*<sup>12</sup> and *Bailey*.<sup>13</sup> In the *Hazeldean* case, the Community League filed an appeal in relation to a plywood manufacturing plant located immediately next to their community. The approval holder objected to the appeals on the basis that none of the parties that had filed an appeal were directly affected.

[58] In *Hazeldean*, the Board stated:

"The Board notes that the residents of the Community live immediately across the street and in the vicinity of the Zeidler plant. The Community distributed a survey to all of the residents of the Hazeldean area and asked them to respond to certain questions concerning the Zeidler plant and its emissions. The results of

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<sup>11</sup> 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.).

<sup>12</sup> *Hazeldean Community League v. Director of Air and Water Approvals Division, Alberta Environmental Protection* (11 May 1995) Appeal No. 95-002 (A.E.A.B.) ("*Hazeldean*").

<sup>13</sup> *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (13 March 2001), Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011-ID (A.E.A.B.) ("*Bailey*").

the survey were submitted to the Board with the Community's representations. Seventy-five of 105 people who completed this survey indicated that they were very concerned about air quality in the neighbourhood. Over 50% of the residents who responded found the odour to be an unpleasant annoyance at least one-half of the time. The Community stated that its close proximity to the Zeidler plant gave rise to these odour complaints because of the prevailing westerly or south westerly winds which cause the emissions to blanket the community. It also stated that there was a great concern regarding the possibility of other compounds within the emissions that may raise health concerns. Their survey found that 55 of 105 completed responses indicated that the residents were concerned with health effects of the Zeidler emissions. Their concern is that the Approval will directly result in increased emissions to the atmosphere, where they will remain at a sufficiently low elevation that the plume distribution will undoubtedly affect the neighbours of the facility who have no choice but to breathe the air outside. Unlike the quality of water, which leaves the ultimate choice (to drink or not) to the user, there is no real option to breathing the ambient air. If the people of the Hazeldean district are not directly affected, no one will ever be.

Herein lies the crux of the directly affected dilemma: how does an appellant discharge the onus of proving that he or she is directly affected when the nature of air emissions is such that all residents within the emission area may be directly affected to the same degree? One might be led to the conclusion that no person would have standing to appeal because of his inability to differentiate the affect upon him as opposed to his neighbour. This is unreasonable and it is not in keeping with the intent of the Act to involve the public in the making of environmental decisions which may affect them.”

[59] The group in *Hazeldean* identified its members and provided the results of the survey that was taken to support its position. The major factor relied on by the Board in accepting the *Hazeldean* group as a directly affected person was that individual members of the group would probably have been determined to be directly affected since they lived in close proximity to the project.

[60] In *Bailey*,<sup>14</sup> the Lake Wabamun Enhancement and Protection Association (“LWEPA”) was found to be directly affected. LWEPA provided a membership list to the Board, and the Board determined that LWEPA

“...was created for the express purpose of engaging in the regulatory approval process, now appealed to the Board. LWEPA is the means by which ... many of

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<sup>14</sup> *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (13 March 2001), Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011-ID (A.E.A.B.) (“*Bailey*”).

the local residents have in fact chosen to carry out their obligations to participate in the TransAlta Approval process.”<sup>15</sup>

In addition, two of its members filed separate, valid appeals, and the Board found there was sufficient evidence to determine that LWEPA, whose members surrounded and used the lake, had status to participate in the appeals. All its members could have filed appeals in their own right and would have, in all likelihood due to their proximity to the lake, been determined to be directly affected.

[61] It is important to understand that it is acceptable for an organization to file an appeal, but in order to demonstrate the personal impact required by section 115 of the *Water Act*, individual members of the organization should also file an appeal – either jointly with the organization or separately. There will be cases, such as *Hazeldean* or *Bailey*, where an organization can proceed with an appeal on its own. However, in these cases, the Board will need to be clearly convinced the individual members of the organization (effectively the “*in personam*” of the organization) are individually and personally impacted by the project.<sup>16</sup>

## **B. Application to Appeals**

[62] The Board acknowledges the Appellant is a legal entity with rights and privileges similar to those of a person, including the right to file an appeal on its own behalf. As the Appellant, it has the onus of showing how it is directly affected by the Director’s decision to issue the Licences.

[63] The Appellant argued the determination of directly affected should be done as part of the substantive hearing. However, the Alberta Court of Queen’s Bench in *Court* has clearly stated determining standing is a preliminary matter and must be determined prior to the substantive hearing. The Board acknowledges it does not have all the evidence before it that

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<sup>15</sup> Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.) at paragraph 56, (*sub nom. Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation*) Appeals No. 00-074, 075, 077, 078, 01-001-005 and 011-ID.

<sup>16</sup> “*In personam*: Against the person. Action seeking judgment against the person involving his personal rights and based on the jurisdiction of his person, as distinguished from his property.” (*Black’s Law Dictionary*, 6<sup>th</sup> ed.)

would be required for a substantive hearing, but this preliminary decision is based on the information provided by the Participants in their submissions.

[64] Section 2 of the *Water Act* notes the importance of the participatory role of Alberta citizens in protecting the environment. This role is not limited to filing appeals. It includes being involved in advisory groups, such as the Appellant.

[65] The Board does not question the Appellant's genuine interest in the protection of the Nose Creek watershed and in particular, Nose Creek. However, as the Appellant explained, its membership includes individuals, some of whom live in the area of Nose Creek, but the membership also includes groups, businesses, and other individuals who support the mandate of the Appellant but do not have any further connection with Nose Creek. A genuine interest does not constitute directly affected. The *Water Act* requires an appellant to be "directly affected." There must be a connection between the appellant and the decision of the Director. If all that was required was a genuine interest, almost anyone could file an appeal and be granted standing. The Legislature clearly intended to create a narrower class of potential appellants.

[66] In assessing whether a group is directly affected, the Board usually reviews the membership of the organization to determine if the individual members would be individually and personally impacted by the Director's decision. In this case, the Appellant did not provide a membership list. It explained its objectives as an organization and some of the work it has been involved in, particularly in policy making. This does not demonstrate how its members or the organization itself is directly affected by the issuance of the Licences. There needs to be a direct link between the Licences and their potential environmental impacts and the suggested harm to the Appellant.

[67] Even if the Board did not apply the group test that requires more than half of an organization's membership to be directly affected in their own right, the Appellant did not provide any of the evidence needed to demonstrate a link between the Licences and an adverse affect on the Appellant. The Appellant's advisory roles and participation in policy making do not establish how the Appellant will be directly impacted from the Licences. There is nothing in the Director's decisions that impact the Appellant's ability to continue to participate in providing input into policy making.

[68] A group can have an interest as a result of having property that may be impacted; the group itself could be directly affected; or the individual members could have an interest that is directly affected. When an individual is found to be directly affected, it is either because the person or that person's property will be impacted.

[69] A common problem in these situations is that most groups do not have a property right that can be impacted by a project. As a result, groups are left to base their claim of directly affected on the arguments that there will be an effect on their "*in personam*" rights. There is no indication in the Appellant's submissions that it owns property that may be impacted by the Director's decisions. The Appellant stated it has goals and objectives that include being involved in policy making to protect watersheds in the Calgary area, but the Appellant itself cannot be adversely impacted by the decisions. The Appellant does not have a property interest in the Nose Creek basin, and it does not have an identifiable *in personam* interest. This distinguishes the Appellant's position from that of corporate and municipal entities. This does not mean there will not be circumstances where groups such as the Appellant will be granted standing, but based on the circumstances of these appeals, the submissions provided, and the judicial and Board decisions referred to above, the Appellant has not demonstrated it is directly affected by the decisions to issue the Licences.

[70] The Appellant explained its mandate is broad and general and its interests involve the waterways within and around Calgary, and that its membership is broadly based. It is not specifically focused on the area the Licence Amendment applies to, which is Nose Creek, or the area the Licence applies to, which is the Bow River. This is in contrast to the situation in *Bailey*, where the interests of LWEPA were limited to activities in a discrete area, specifically Lake Wabamun.

[71] The Board does not only look at proximity to determine the directly affected status of an appellant; it looks at other factors, including economic interests<sup>17</sup> or regular use of the area.<sup>18</sup> Although the Board recognizes some of the Appellant's members, in all likelihood,

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<sup>17</sup> *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (24 February 2005), Appeal Nos. 03-150, 03-151 and 03-152-R (A.E.A.B.).

<sup>18</sup> *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.).

use the Nose Creek area for recreational purposes, there is no specific information as to how many of its members use the area, how frequently they use it, or how each member uses the area. The Appellant only provided general statements as to how its members might use the area, and none of this information indicated its members had a use or interest in the area beyond the general interest of Albertans in environmental matters.

[72] The Appellant and its members are involved in policy making, and although it may be beneficial to protecting the environment, it does not demonstrate how the Director's decisions would affect the Appellant's use or enjoyment of the area. The Appellant can still continue to use its resources to contribute to policy making that will protect the Nose Creek area.

[73] Although the Appellant argued it should be granted public interest standing because there is no one else who can bring the appeal, the Board does not have the authority to grant public interest standing. The legislation clearly states that only those who are directly affected by the Director's decisions can file a Notice of Appeal. In addition, the Board does not agree there is no one else who could have filed the appeals. Those who live in the area and use the area or those who regularly use the area and whose interests are impacted by the Director's decisions, could have filed Notices of Appeal.

[74] The Board has continually stated in prior decisions regarding groups and organizations seeking to appeal, that they must be able to demonstrate how *individual members* are directly affected. The Board does not discourage groups from appearing before it, but the *Water Act* clearly states that, apart from an applicant or licensee, only those persons who are directly affected by the decision can submit a Notice of Appeal to the Board. The standard Notice of Appeal form asks the appellants if someone will be representing them in the appeal. If an individual appellant wants to be represented by an organization, he or she can indicate this on the Notice of Appeal. This would allow an organization to represent an individual member's interests. The organization can also file a Notice of Appeal, but this should be in addition to the individual member's appeal. Although some organizations might argue that filing one appeal on



behalf of all the members of the organization may be more efficient, depending on the circumstances of the particular appeal, it may not satisfy the directly affected test prescribed in the legislation.

[75] If a member of the Appellant had filed an appeal and the Board found them to be directly affected, it is possible the Appellant could have represented that person in the appeal, or the Appellant could have participated as an intervenor in its member's appeal if the Board determined the Appellant's participation would be beneficial to the panel considering the matter. Since no member filed an appeal, these options are not available in this case.

[76] The Appellant in these appeals has not demonstrated it is directly affected by the Director's decisions to issue the Licences. Therefore, the Board dismisses the appeals.

#### **IV. DECISION**

[77] The Board dismisses the appeals of the Calgary River Forum Society since it has not established that it is directly affected by the decisions of the Director to issue the Licence and Licence Amendment.

Dated on July 3, 2019, at Edmonton, Alberta.

"original signed by"

Meg Barker  
Panel Chair