OFFICIAL TRANSCRIP[illegible]

1 Action No. 0403 18462

2

3 IN THE COURT OF QUEEN'S BENCH OF ALBERTA

4 JUDICIAL DISTRICT OF EDMONTON

5

6 IN THE MATTER OF THE ENVIRONMENTAL APPEALS BOARD (the
7 "Board) as established under the *ENVIRONMENTAL*
8 *PROTECTION AND ENHANCEMENT ACT*, R.S.A. 2000, c. E-12, as
9 amended ("EPEA");

10

11 AND IN THE MATTER OF *WATER ACT* Approval 00188589-00-00
12 and EPEA Amending Approvals 11767-01-02 and 46972-00-01
13 (collectively, the "Approvals");

14

15 AND IN THE MATTER OF THE BOARD'S DECISION OF MAY 26,
16 2004, to grant Ben Gadd standing to appeal the Approvals
17 (the "Standing Decision");

18

19 AND IN THE MATTER OF THE BOARD'S DECISION DATED
20 SEPTEMBER 9, 2004, denying a request for a stay of its
21 proceedings (the "Stay Decision");

22

23 AND IN THE MATTER OF THE BOARD'S DECISION DATED
24 SEPTEMBER 9, 2004, granting numerous persons the right
25 to participate in the Board hearing (the "Intervener
26 Decision")

27

1 BETWEEN:

2 CARDINAL RIVER COALS LTD.

3 Applicant

4 - and -

5

6 THE ENVIRONMENTAL APPEALS BOARD and BEN GADD

7 Respondents

8

9 ---

10 REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE CLARKE

11 ---

12 THE COURT: This is a judicial review
13 application to determine whether the Environmental
14 Appeal Board, the Board, erred in law when it determined
15 that the respondent, Ben Gadd(Gadd), was a person
16 "directly affected" and therefore entitled to submit a
17 notice of appeal.
18 In 2000, the Cheviot project was finally approved.
19 It contemplated that the coal being mined would be
20 processed at the mine site. Conditions I gather have
21 changed and the applicant, Cardinal River Coals Ltd.
22 (CRC), want to take the mined coal and transport it by
23 truck to its Luscar site for processing and shipping.
24 In the 2000 approved project, there was a
25 transportation corridor between the two sites which
26 included an upgraded road, upgrading of the existing
27 railway and a right of way for electrical power

1 transmission lines. Because of the change where the
2 coal will be processed, CRC wants to change the road
3 portion of the transportation corridor which is called
4 the Haul Road. The Haul Road will need significant
5 upgrading to handle the truck traffic moving the coal.
6 I gather indeed that that work has already been done.
7 The Director for Alberta Environment approved the
8 changes and issued the appropriate documentation for CRC
9 to go ahead with the approvals. The Board received a
10 Notice of Appeal from Gadd. CRC promptly challenged
11 Gadd's standing to appeal on the ground that he did not
12 meet the "directly affected" person requirement mandated
13 in the legislation to have standing. That would be
14 pursuant to Sections 91(1)(a)(i) and 95(a)(ii) of the
15 Environmental Protection and Enhancement Act, R.S.A.
16 2000, c. E-12.
17 On April 26, 2004, a preliminary meeting was held
18 to determine amongst other matters, whether Gadd is
19 "directly affected" by the approvals given by the
20 director. Gadd appeared and gave oral evidence in
21 addition to his written affidavit on this issue and a
22 letter followed from the Board granting standing.
23 On October 8, 2004, the Board issued its Decision.
24 In that Decision, the Board set out the tests that it
25 used to determine what "directly affected" meant and
26 from that decision I quote paragraphs 66 to 68.
27 "What the Board looks at when assessing the

1 the directly affected status of an appellant
2 is how the appellant will be individually
3 and personally affected and the more ways in
4 which the appellant is affected the greater
5 the possibility of finding the person
6 directly affected.

7 The Board also looks at how the person
8 uses the area, how the project will affect
9 the environment and how the effect on the
10 environment will affect the person's use
11 of the area. The closer that these two
12 elements are connected (their proximity)
13 the more likely the person is directly
14 affected. The onus is on the appellant
15 to present a prima facie case that he is
16 directly affected.

17 The Court of Queen's Bench stated an
18 appellant needs only to show that there is
19 a potential for an effect on their interests.
20 This potential effect must still be within
21 reason and plausible for the Board to
22 consider it sufficient to grant standing.
23 The effect does not have to be unique in
24 kind or magnitude, however the effect that
25 the Board is looking for needs to be more
26 than an effect on the public at large (it
27 must be personal and individual in

1 nature) and the interest which the
2 appellant is asserting as being affected
3 must have something more than the
4 generalized interest that all Albertans
5 have in protecting the environment."
6 With respect to Mr. Gadd, the Board says:
7 "It is also clear that the appellant's
8 use of this area is different from
9 that of other Albertans. He obtains
10 a portion of his income from operating
11 wilderness tours in the area. This is
12 a personal impact that is beyond that of
13 a generalized interest in protecting
14 the environment. His particular use of
15 the area requires the wilderness aspect
16 of the area be maintained as much as
17 possible. It is irrelevant that he does
18 not require federal or provincial
19 permits to conduct his business in the
20 area or that he does not own property or
21 live in the area. While these types of
22 property interests may be of assistance
23 in making a determination that someone is
24 directly affected, it is not a pre-requisite.
25 Other Albertans may use the area
26 for recreational purposes and to enjoy the
27 natural setting and although their enjoyment

1 of the area may be generally affected by
2 the Haul Road, their livelihood in most
3 cases is not dependant on the protection
4 of the wilderness around the mine site."
5 The Board then reaches its conclusion at paragraph 76
6 where it says:
7 "The Board concludes that the appellant has
8 provided enough evidence to indicate his
9 economic livelihood could be affected by
10 the construction and operation of the Haul
11 Road. This means that the appellant is
12 directly affected and the Board therefore
13 grants the appellant standing for the purposes
14 of these appeals."
15 At this application, counsel for the Board quite
16 properly raised the issue of prematurity. CRC filed its
17 application for Judicial Review on September 17. The
18 Board hearings were scheduled for September 27 and 28.
19 The Board had to this point resisted bringing its
20 proceedings to a halt. CRC requested an adjournment
21 after it filed its Judicial Review Application and CRC
22 achieved its objective to bring the Board proceedings to
23 a halt. The hearings were adjourned pending this
24 application.
25 Judicial Review is a discretionary remedy. The
26 Courts have discouraged resort to judicial review
27 remedies while the administrative proceedings are still

1 ongoing except in extraordinary circumstances. CRC says
2 it had to act now since the six-month time limit for
3 judicial review is running and it does not know when the
4 Board will issue its Report and when the Minister will
5 make a Decision. The Board does not make any decision
6 with respect to the approvals obtained by CRC. It only
7 issues a Report to the Minister and it is the Minister
8 who makes the Decision.

9 I am satisfied that the time limits for judicial
10 review only begin to run from the time that the Minister
11 makes a decision. It is possible, for example, that the
12 Minister may simply approve the Director's Approvals and
13 therefore the whole standing issue would become moot.

14 Also, if I had to conclude that this issue was not
15 premature and that the Board's standing decision is
16 valid, where does that leave the parties when the
17 Minister ultimately makes a Decision.

18 CRC relied heavily on the case of CPR vs. Matsqui
19 Indian Band (1995), 1 SCR 3. In that case, the Federal
20 Government and Indian bands had set up a process whereby
21 the bands could assess and tax lands within the reserve.
22 After the CPR was served with tax notices, it commenced
23 proceedings in Federal Court to set aside those
24 assessments on the basis that since they had fee simple
25 title to the lands, they were not "within the reserve"
26 for assessment and taxation purposes.

27 The Federal Court of Appeal allowed the action to

1 proceed and an appeal was taken to the Supreme Court of
2 Canada. The Court was split five to four in its
3 decision. One issue was whether or not the CPR was
4 required to go through the process of appealing the
5 assessments until they reached the Federal Court or
6 could they challenge the process now. The majority
7 allowed the motion of CPR to strike the proceedings at
8 this early stage to proceed. They noted that such an
9 application is discretionary and it is proper for the
10 Court to consider the policy underlying the scheme in
11 the Act to determine how to exercise the discretion.
12 In addition, the Court considered the issue to be
13 one of law in which the Bands had no particular
14 expertise. In my opinion, this case is distinguishable
15 since I have concluded that the scheme of this act
16 intends that the Board will determine who is or who is
17 not directly affected and that involves not only a
18 question of law, but also of fact as well as policy and
19 expertise. I am satisfied that this conclusion fits
20 within the legal principle set out in the CPR Case
21 supra.
22 Our Court when considering a similar issue, that is
23 a claimed jurisdictional issue, decided that until the
24 overall process is concluded and a decision is made by
25 the Minster, it is not appropriate for the Court to
26 interfere. See McCains Foods Canada vs. Alberta
27 Environmental Appeal Board (2000), at 469. The rationale

1 for this position is explained by the Ontario Divisional
2 Court as follows and I quote:
3 "For some time now the Divisional Court has,
4 as I have indicated, taken the position that
5 it should not fragment proceedings before
6 administrative tribunals. Fragmentation
7 causes both delay and distracting interruptions
8 in the administrative proceedings. It is
9 preferable, therefore, to allow such matters
10 to run their full course before the tribunal
11 and then consider all the legal issues
12 arising from the proceedings at their conclusion."
13 See the Ontario College of Art vs. Ontario (Human Rights
14 Commission) (1993), 99DLR 4th, 738 and 740.
15 On the finding that the application is premature, I
16 am dismissing the application. If I am wrong in making
17 that decision, I am in any event going to decide the
18 application on its merit.
19 In so doing, the first issue I must decide is what
20 is the appropriate standard that the Court should apply
21 in reviewing the Board's decision. I have concluded That
22 the issue has been settled by the Case of Court vs.
23 Environmental Appeal Board (Alberta) (2003), 333 Alberta
24 Reports 308. It was a decision of my brother judge, Mr.
25 Justice McIntyre. That case dealt with exactly the same
26 issue. The standing of the applicant in that case as a
27 directly affected person. Justice McIntyre said the

1 question was one of mixed fact, law and policy (see
2 paragraph 56) and concluded that the issue of standing
3 was intended by the legislature to be left to the
4 exclusive jurisdiction of the Board. It is only
5 reviewable on the patently unreasonable standard (see
6 paragraph 58). I agree with that decision.

7 CRC submits that although the decision was not
8 appealed, it was nonetheless wrong. In particular, at
9 paragraph 41 and 42, Justice McIntyre refers to the very
10 strong privitive clause to conclude give great deference
11 should be shown in reviewing the Board decision. CRC
12 says that is an error because the privitive clause does
13 not apply to a Board deciding someone has standing.

14 The privitive clause, Section 102, only applies
15 where the Board is empowered or compelled to do
16 anything. Section 95(a)(ii) only empowers the Board to
17 decide if a person is "not directly affected by the
18 decision". It does not empower the Board to decide that
19 a person is directly affected. That decision comes
20 under Section 91(1)(a)(i) which says a person may submit
21 an appeal to the Board if they are directly affected.
22 It is CRC's submission that the Board is not empowered
23 to decide that issue so that the privitive clause does
24 not apply. I do not agree.

25 The Act clearly empowers the Board to decide that a
26 person is not directly affected and in so doing, they
27 have to answer the question, what is the test that we

1 will use and applying that test if the Board decides
2 that the person does not fit within the not directly
3 affected category, the only conclusion left is that the
4 person is directly affected. In my judgment, the Act
5 clearly empowers the Board to determine the standing of
6 an appeal person as directly affected or not. So I
7 conclude that Justice McIntyre did not err in his
8 analysis at paragraphs 41 and 42 of that decision.
9 To say that the Board made a jurisdictional error
10 is no longer helpful. The courts have moved away from
11 that description. Where this description of an error
12 occurs today is to find that an error, after the outcome
13 of the pragmatic and functional analysis or the
14 tribunal, where this tribunal does not make a correct
15 interpretation. The proper question today as I
16 understand it is to ask did the legislature and the
17 legislation intend to have the Board make the decision
18 as to whether or not someone was directly affected.
19 Section 95(5)(a)(ii) makes the legislature's intention
20 patently clear on that issue.
21 CRC also says that the decision of Justice McIntyre
22 did not refer to a House of Lords and a subsequent Court
23 of Appeal decision decided in different context which
24 were defining the term directly affected means. As I
25 understand it, the Board in that particular case, did
26 consider those cases. I am satisfied that the Board has
27 properly decided the legal definition of those words. I

1 am satisfied that I should follow the court decision and
2 the standard to be applied to the Board's decision in
3 this case is one of patent unreasonableness. The Board
4 decision clearly was not patently unreasonable and the
5 application should be dismissed on that ground.

6 The Board knew that it had to find that Gadd was
7 directly affected but also knew that Gadd was also
8 personally affected (see paragraph 68 of the Board
9 decision). The Board found on the evidence, a personal
10 impact on Gadd. CRC complains that Gadd had no permit
11 or exclusive license to lead for profit tours in that
12 area. The Board has previously decided that such a
13 permit or license makes it easier to find that a person
14 is directly affected in the personal way required, but
15 such exclusivity or permitted license right is not fatal
16 to a person being directly affected.

17 CRC says that the Board deciding "directly
18 affected" for the purpose of Section 91 is a pure
19 question of law. I do not agree. The legal definition
20 of directly affected does have a component which is a
21 legal component. I am also satisfied that the Board in
22 this particular case applied the correct legal
23 definition and on the facts reached correct decision,
24 but I am also satisfied that in addition to the legal
25 and factual elements for the purposes of either Section
26 91 or 95, there is as well proper policy considerations
27 which apply. Thus, if I am wrong in concluding that

1 patent unreasonable is the test and it is one of
2 correctness, then in my judgment the Board was correct
3 in the decision that it made on standing.
4 The application is therefore dismissed. By earlier
5 court orders, as I understand it, no costs are to be
6 awarded with respect to this application and Madam Clerk
7 I think that concludes our proceedings.
8
9 PROCEEDINGS CONCLUDED
10
11 Delivered orally at the Law Courts Building, Edmonton,
12 Alberta on the 4th day of November, 2004.
13
14 S. Finlay, Ms.
15 For the Applicant
16
17 J. Klimek, Ms.
18 For the Respondents
19
20 B. Jones
21 Court Clerk
22
23 TH - Transcript Management Services, Edmonton
24 Typed - 12th November, 2004
25
26
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Action No.: 0403 18462

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JUDICIAL DISTRICT OF EDMONTON

IN THE MATTER OF THE ENVIRONMENTAL APPEALS BOARD (the "Board") as established under the *ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT*, R.S.A. 2000, c. E-12, as amended ("EPEA");

AND IN THE MATTER OF *WATER ACT* Approval 00188589-00-00 and EPEA Amending Approvals 11767-01-02 and 46972-00-01 (collectively, the "Approvals");

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BETWEEN:

CARDINAL RIVER COALS LTD.

Applicant

- and -

THE ENVIRONMENTAL APPEALS BOARD and BEN GADD

Respondents

BEFORE THE HONOURABLE MR. JUSTICE. C. PHILIP CLARKE IN CHAMBERS	))))	IN THE LAW COURTS, CITY OF EDMONTON, PROVINCE OF ALBERTA, THIS 4TH DAY OF NOVEMBER, 2004

ORDER

UPON THE APPLICATION OF THE APPLICANT; AND UPON HEARING COUNCIL FOR THE APPLICANT; AND UPON HEARING COUNCIL FOR THE RESPONDENT, THE ENVIRONMENTAL APPEALS BOARD; AND UPON HEARING COUNCIL FOR THE RESPONDENT, AND BEN GADD;

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. The Judicial Review application is dismissed.

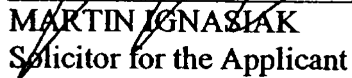
2. There will be no costs in this action.

"Kim Lukay"
For Clerk ~~HONOURABLE JUSTICE C. PHILIP CLARKE~~
of the Court of Queen's Bench

APPROVED AS TO FORM AND CONTENT:

22 December 2004

FRASER MILNER CASGRAIN LLP



Per: ______________________
MARTIN IGNASIAK
Solicitor for the Applicant

____
Andrew C.L. Sims, Q.C.
Solicitor for Alberta Environmental Appeals Board

Action No.; 0403 18462 · 2004

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BETWEEN:

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Applicant

\- and -

THE ENVIRONMENTAL APPEALS BOARD
and BEN GADD
Respondents

ORDER

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