In the Court of Appeal of Alberta

Citation: Normtek Radiation Services Ltd v Alberta Environmental Appeal Board, 2020 ABCA 456

Date: 20201211
Docket: 1801-0385-AC
Registry: Calgary

Between:

Normtek Radiation Services Ltd.

Appellant
(Applicant)

- and -

Alberta Environmental Appeals Board, Secure Energy Services Inc. and Director of Alberta Environment and Parks

Respondents
(Respondents)

The Court:

The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Jo'Anne Strekaf
The Honourable Madam Justice Ritu Khullar

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice J.R. Ashcroft
Dated the 21st day of November, 2018
Filed on the 18th day of December, 2018
(2018 ABQB 911, Docket: 1701 00469)

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Memorandum of Judgment

The Court:

Introduction

[1] This is an appeal of a judicial review upholding a decision of the Alberta Environmental Appeals Board (Board) refusing to hear an appeal of an approval granted by the designated director of approvals (the Director) permitting the respondent to accept and dispose of certain naturally occurring radioactive material (sometimes referred to as NORM) in its Pembina Landfill near Drayton Valley, Alberta.

[2] The Environmental Appeals Board declined to hear the appeal of the approval because it was of the opinion that the party appealing, the appellant herein, was not directly affected by the decision of the Director to amend the landfill approval to permit the acceptance of radioactive wastes. Section 95(5)(a)(ii) of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (*EPEA*) provides that the Board may dismiss an appeal of a Director's decision or approval if it is of the opinion that the person submitting the notice of appeal is not directly affected by the decision. At issue was whether the Board's decision to dismiss the appellant's appeal was reasonable.

[3] In a letter dated October 13, 2016, the parties were advised that the Board had decided to dismiss the appellant's appeal because the appellant was not directly affected by the Director's decision and that the Board's reasons would be provided in due course. These reasons were provided by the Board's Chairman on March 2, 2018. In a 47-page decision, the Chairman ruled that the appellant's concerns were primarily economic and that it failed to demonstrate that its use of a natural resource would be affected by the amending approval.

[4] The appellant sought judicial review of the Board's decision and an order quashing it on the ground that the Board employed an unduly restrictive, and therefore unreasonable, interpretation of the phrase "directly affected" in sections 91(1)(a)(i) and 95(5)(a)(ii) of the *Environmental Protection and Enhancement Act*.

[5] The appellant's application for judicial review was dismissed on the basis that the Board's finding that the appellant was not directly affected by the Director's decision was reasonable. The judicial review judge also ruled more generally that the *Environmental Protection and Enhancement Act* does not confer a discretionary authority on the Board to hear an appeal by a person not directly affected based on a general public interest standing.

[6] The appellant now appeals to this Court arguing that the Board's interpretation and application of the phrase "directly affected" was unreasonably restrictive and that the reviewing

judge erred in upholding the Board's interpretation of "directly affected." The appellant also appeals on the basis that the reviewing court erred in upholding the Board's conclusion that it could only hear appeals of approvals by persons directly affected by Director's decisions. The appellant had argued that *Environmental Protection and Enhancement Act* permits the granting of public interest standing to an appellant with a genuine interest and something of public interest to contribute, yet not directly affected.

[7] For the reasons which follow, we would allow the appellant's appeal of the order of the judicial review judge and remit the matter back to the Board to decide the matter of the appellant's standing to appeal the Director's decision. We are of the view that both the Board and the judicial review judge adopted an unreasonable and unjustifiably restrictive interpretation of the phrase "directly affected" which does not accord with the *Environmental Protection and Enhancement Act* in determining whether a person wishing to appeal a Director's decision is directly affected by it. We agree, however, with both the Board and the judicial review judge, that section 95(5) of the Act does not confer jurisdiction on the Board to hear appeals of Directors' decisions by persons who are not directly affected by those decisions.

[8] In order to better appreciate our reasons, we find it necessary to summarize the record which was before the Board when it made its decision to dismiss the appellant's appeal. We do this not only to provide context for the Board's decision, but also because the Board's decision was based on a view that much of the record before it was irrelevant to the issue of standing.

Application for Director's Approval

[9] The process which led to the appeal began with the respondent, Secure Energy Services Inc. (Secure Energy), applying to the designated Director for approval of an amendment to its existing Class I landfill approval. The amendment was sought in order to permit the receipt of concentrated naturally occurring radioactive material at the respondent's Pembina landfill northwest of Drayton Valley.

[10] Under the *Environmental Protection and Enhancement Act*, no person may commence or continue any activity that is designated by the regulations as requiring an approval without the required approval (ss 60 and 61). Also, no person may make any change to an activity which is the subject of an approval unless an amendment to the approval authorizing the change is issued by the Director (s 67(1)(a)). Under section 5 of the Act's *Activities Designation Regulation* (276/2003), an approval is required for the construction, operation and reclamation of a landfill where more than 10,000 tonnes per year of waste is being disposed of. A "landfill" is defined in section 2(1)(i) of the Regulation as a waste management facility at which waste is disposed of by placing it on or in land, but does not include a land treatment facility, a surface impoundment, a salt cavern or a disposal well.

Normtek's Statement of Concern

[11] The *Environmental Protection and Enhancement Act* provides that any person who is directly affected by a Director's decision may submit to the Director a written statement of concern setting out that person's concerns with respect to the decision (s 73).

[12] The appellant, Normtek Radiation Services Ltd. (Normtek), is in the business of decontaminating (removing) naturally occurring radioactive material (typically radioactive scales, sludges and films) which become unnaturally accumulated or concentrated in oilfield waste or on oilfield equipment (principally production pipe) as a consequence of oil and gas extraction and production operations. Normtek then disposes of the radioactive material either in an approved landfill (like that which the Director approved) or in a secure subterranean geological formation, depending on the level of the material's radioactivity.

[13] Normtek responded to Secure Energy's application for approval by submitting to the Director what the *Environmental Protection and Enhancement Act* refers to as a statement of concern indicating its concerns with the proposal to landfill radioactive waste material with a radioactivity concentration of higher than 5-10 Bq/g rather than dispose of it in a subterranean geological formation. Secure's proposal was to landfill NORM up to 70 Bq/g. A Bq or Becquerel is a measure of radioactivity. A Bequerel is one nuclear transformation or disintegration per second. Normtek argued that generally-accepted industry standards and national and international guidelines suggest that Secure was proposing to landfill radioactive wastes that ought properly to be disposed of in a secure subterranean geological formation.

[14] Normtek contended that the landfilling of naturally occurring radioactive material which becomes concentrated in oil field waste is only appropriate for low radioactivity level material (5-10 Bq/g). Higher radioactivity level NORM, such as that proposed to be landfilled at Secure Energy's Pembina Landfill (up to 70 Bq/g), Normtek submitted, is typically sent for geological disposal in salt caverns in Saskatchewan. Normtek's statement of concern also pointed to the lack of a provincial regulatory regime for NORM and the lack of clarity surrounding the respective responsibilities of the Alberta Energy Regulator and Alberta Environment with regard to NORM disposal. Normtek urged the Director not to approve the acceptance of high level radioactive waste at Secure's facility until appropriate waste classification criteria for NORM disposal had been developed. Apparently, there had been a previous failed attempt by the Alberta Energy Regulator to reach an industry/regulator consensus on landfill acceptance limits for oilfield NORM. Significantly, Normtek made it clear that it did not object to the landfilling of low-level radioactive materials.

[15] In response to Normtek's statement of concern, the Director questioned whether Normtek was directly affected by Secure's application and in particular whether the company resided, owned, or used land, near the landfill.

[16] Normtek responded to the Director's inquiry acknowledging that it did not have any land holdings in the vicinity of the landfill, but submitted that factors other than ownership of land near the proposed activity can give rise to being directly affected. Normtek described how it would be impacted if the amendment, as applied for, was approved. Normtek submitted that an approval would change the way NORM disposal was currently being conducted. Normtek argued that the approval would give Secure a competitive advantage over anyone in the business of disposing high activity naturally occurring radioactive material because Secure proposed to simply dispose of such radioactive waste in its landfill, rather than manage it in accordance with what Normtek submitted were generally accepted best practices. Normtek submitted if the applied-for approval was given, high level radioactive materials which had hitherto only been permitted to be disposed of in underground geological formations would now be allowed to be disposed of near the surface.

[17] To quote from Normtek's October 26, 2014 letter to the Director:

> ..industry will simply dispose of high level radioactive waste rather than manage the waste in compliance with generally accepted best practises developed by the IAEA [International Atomic Energy Agency] and industry…
>
> Management of NORM waste will simply disappear for cheap disposal tipping fees and technical experts within the industry will be lost.…
>
> Normtek is affected financially as capital spent on equipment to transfer waste to geological disposal facilities will be lost if dumping high level NORM waste into the proposed Secure landfill is approved as submitted. This specialized equipment is only used for geological disposal and has been utilized only in this industry in Western Canada…
>
> Normtek's business and its employees are directly affected by the proposed project. The project changes the NORM industry not only in Alberta but all of Canada.

[18] Normtek claimed it and others in the NORM treatment and disposal industry would be directly affected by what it argued would be a substantial change to the rules of the game if the approval was granted. To quote Normtek's letter to the Director:

> In summary, Normtek does not compete with the proposed project as it does not own or operate any disposal facilities, however, Normtek's business and its employees are directly affected by the proposed project. The project changes the NORM industry not only in Alberta but all of Canada. Health Canada and the Canadian Nuclear Safety Commission have recognized that the International Atomic Energy Agency and the International Commission on Radiological Protection is comprised of leading experts in the field of radiation. As such, they have adopted these agencies best practices. Normtek and the industry in Alberta have developed based off these sound radiological principles. Low level NORM

> waste has been approved for landfill disposal and high level waste for geological disposal. Canada has the luxury of geological salt cavern disposal. Changing the industry by allowing high activity disposal levels greater than those already approved in Canada to levels that are also not consistent with international practices affects Normtek, its employees, the industry as a whole and the way international communities look at Canada's NORM management approach.

Director's Rejection of Normtek's Statement of Concern

[19] Alberta Environment's District Approvals Manager (on behalf of the Director) responded to Normtek's letter indicating how it would be directly affected by approval of Secure Energy's application in a letter which did not address any of the grounds upon which Normtek argued that it was directly affected. Rather, Alberta Environment's letter simply stated,

> Thank you for your letter dated August 24, 2014 [Normtek's Statement of Concern] and your clarification letter dated October 26, 2014 [Normtek's standing letter] expressing concerns about the Pembina Area Landfill's application to accept Naturally Occurring Radioactive Materials (NORM) waste.
>
> Your mailing address indicates that your place of residence is outside the area of environmental impact associated with this proposed project. On this basis, you will not be considered as directly affected and your submission will not be considered a statement of concern.

[20] This decision by the Director is the subject of a separate judicial review proceeding, but the reason given by the Director for finding that Normtek was not directly affected by Secure Energy's application (namely that Normtek's place of residence was outside the area of environmental impact) presaged the reasons given by the Environmental Appeals Board for its finding that Normtek was not directly affected by the Director's decision.

Director's Decision (Approval)

[21] On July 14, 2016, the Director issued an approval amending Secure Energy's landfill approval to permit it to receive and dispose of NORM waste that did not exceed certain prescribed maximum concentration limits (70 Bq/g) as proposed by Secure Energy. The approval also required Secure Energy to operate the landfill in accordance with the "Canadian Guidelines for the Management of Naturally Occurring Radioactive Materials". The Guidelines were developed by the Federal-Provincial-Territorial Radiation Protection Committee (the FPTRPC). Among other things, the Guidelines set maximum concentration acceptance limits for NORM dispersed in soils and other media.

[22] The federal government has jurisdiction over nuclear energy by virtue of its declaratory power under section 92(10)(c) of the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 and the

national concern branch of the peace, order and good government power in section 91. The federal government has not formally transferred power to the provinces to regulate NORM. Instead, the federal government takes the position that since NORM is not part of the nuclear fuel cycle and poses less of a risk, it falls to the provincial and territorial governments to regulate it. The *General Nuclear Safety and Control Regulations* (SOR/2000-202) under the federal *Nuclear Safety and Control Act*, SC 1997, c 9, expressly exempt naturally occurring nuclear substances from the application of the *Nuclear Safety and Control Act* and the Regulations.

[23] Provincially, "radiation" is defined as a "substance" in section 1(mmm) of the *Environmental Protection and Enhancement Act*. Under the Act, no person is permitted to release a substance into the environment in an amount, concentration or level that is in excess of that expressly prescribed by an approval, a code of practice or the regulations (s 108(1) of the Act).

[24] The Canadian Guidelines for the Management of NORM referenced in the approval were developed to help the provinces regulate NORM in order to address radiation exposure risks and to harmonize practices between provinces and minimize jurisdictional gaps. They purport to set out a code of best practices.

[25] The Director's approval expressly requires the approval holder to operate its landfill in accordance with these Guidelines. Yet the Director's approval also expressly prescribes certain radioactivity limits for materials accepted by the landfill which appear to be expressed in a multiple of the concentration limits (10 times the concentration limits) for exempt material set out in certain International Atomic Energy Association Regulations. Normtek's position was that the federal Guidelines and the so-called International Atomic Energy Association Regulations were violated by the very terms of the approval which purported to incorporate them.

Normtek's Appeal of Director's Decision

[26] Normtek filed a notice of appeal of the Director's decision approving the acceptance of NORM at Secure Energy's Pembina Landfill

[27] The *Environmental Protection and Enhancement Act* provides that a notice of appeal of a Director's decision may be submitted to the Environmental Appeals Board by any person who previously submitted a statement of concern and who is directly affected by the Director's decision (s 91(1)(a)(i)). However, the Act also provides that the Environmental Appeals Board may dismiss a notice of appeal if it is of the opinion that the person submitting the notice of appeal is not directly affected by the decision (s 95(5)(a)(ii)).

[28] The form of notice of appeal prescribed by the Environmental Appeals Board requires the appellant to address the issue of whether or not it is directly affected. The form asks the question, "How is it [Alberta Environment's decision] affecting you?" Normtek's answer was as follows:

> Financially, commercially and requires us to manage radioactive materials that are not consistent with the recommendations of the IAEA [International Atomic Energy Association] or that governed under CNSC [Canadian Nuclear Safety Commission]. Creates confusion within an industry already lacking radioactive waste management regulations. Does not afford the same level of environmental safety as that afforded in other provinces.

[29] The form of notice of appeal also requires the appellant, who has only 30 days to do so, to identify the disposition it seeks from the Environmental Appeals Board. To quote the Board's form:

> What would you like the Board to do to resolve your appeal? (Note: If you fail to state all solutions to your appeal here, you may be prevented from raising them later in your appeal.)

Normtek sought the following disposition of its appeal:

> We would ask the Board to recommend to the Minister to vary the acting [director's] approval for radium 226 to 5 Bq/g which is consistent with the BC Licensed Hazardous waste facility until such time as the request for amendment can be reviewed by the AER [Alberta Energy Regulator] giving consideration to the concerns addressed in the appeal or ask the Minister to reverse the acting [director's] approval until such time as formal policies have been implemented on radioactive waste in Alberta.

Again, it is significant that the relief Normtek requested sought what it considered to be regulatory harmonization (i.e. a level playing field), not that Secure Energy's application be denied outright.

[30] Attached to its Notice of Appeal, Normtek appended a 10-page written submission addressing both its standing and the reasons for the disposition it sought, namely suspension of approval of landfill disposal of NORM higher than 5 -10 Bq/g pending the development of policies governing the disposal of NORM.

Normtek's Standing to Appeal the Director's Decision Questioned

[31] Following submission of Normtek's notice of appeal Secure Energy questioned whether Normtek was directly affected by the Director's decision to amend its landfill approval.

[32] The Board then prescribed a procedure whereby the issue of Normtek's "directly affected" status would be determined. The procedure involved an initial written submission by Normtek, followed by a written response submission from Secure Energy and a rebuttal submission by Normtek, after which the Board would make its decision.

Normtek's Submission on Standing

[33] In its initial 19-page submission to the Environmental Appeals Board, Normtek identified what it considered to be the direct effect on it of the Director's decision to approve the receipt and disposal of high level of naturally occurring radioactive material by Secure Energy at its Pembina Landfill. Normtek submitted that it would be directly affected commercially by what it characterized as the Director's decision to approve the landfilling of higher activity radioactive waste and that the commercial impact on it would in turn lead to an adverse effect on the environment because its business, the business of decontaminating equipment and other media of higher levels of naturally occurring radioactive material and disposing of it in subterranean geological formations, would be discouraged. Normtek argued that its investment in developing decontamination methods was threatened by the Director's decision because its specialized proprietary decontamination equipment, which it claimed it spent thousands of dollars designing, would no longer be needed.

[34] Normtek also argued that its consulting services would also be directly and adversely affected by what it characterized as the Director's decision not to follow industry standard practices and regulatory best practices for disposing of radioactive waste. Normtek argued that it would now be inappropriate for it to advise clients to follow the International Atomic Energy Association Regulations which required that high activity long-lived radionuclides be disposed of in geological formations if they were permitted to be disposed of in a landfill.

[35] Normtek claimed that it would have to lay off employees and shut down its operations as a result of the Director's approval. But more importantly, having regard to the purposes of the *Environmental Protection and Enhancement Act*, Normtek argued that as a result of the approval, over 99% of radioactively contaminated oilfield and other equipment, as well as radioactive produced water, would now be approved for direct disposal into a landfill rather than what it argued was the more environmentally responsible method of disposal in a geological formation, following decontamination of radiologically impacted metal and other media for recycling or reuse. Normtek submitted that the approval would result in the acceptance of significant quantities of NORM waste which was currently being decontaminated (removed) and disposed of in a secure geological formation. Normtek argued that it was directly affected because the amending approval gave Secure Energy a competitive advantage of being permitted to simply landfill high level radioactive material rather than dispose of it in an environmentally sound manner after having decontaminated the media or the equipment upon which the radioactive waste was affixed or concentrated.

[36] In short, Normtek's position was that because its business was based on adhering to the international and national standards for disposal of NORM, the negative impact on its business and the negative effect on the environment would be inextricably intertwined.

[37] Normtek also addressed the view expressed by the Director in rejecting its statement of concern that it was not directly affected because neither the company nor its principals or employees resided near the landfill. Normtek pointed to prior decisions of the Environmental

Appeals Board where appeals by persons not residing close to the approved activity were found to be directly affected in the face of similar objections to their "directly affected" status.

[38] Normtek also argued that the Director's decision and Secure Energy's approval was precedent-setting in that only a limited number of companies currently specialize in decontamination and disposal of NORM waste.

Approval-Holder's Submissions on Normtek's Standing

[39] Secure Energy responded to Normtek's submissions on standing. Their argument was that Normtek's interests were purely commercial and that Normtek was making an improper use of the environmental appeal process to seek insulation from fair competition. Secure Energy also argued that there was no connection between the alleged economic impact on Normtek and any effects on the environment. It further submitted that Normtek was not directly affected because it failed to demonstrate that Secure Energy's acceptance of NORM waste in accordance with the terms and conditions of its amending approval would harm a natural resource used by Normtek or would harm Normtek's use of a natural resource. This latter submission was significant because it formed the basis of the Board's decision.

[40] Also significant was the fact that Secure Energy took the position that the vast majority of Normtek's submissions did not relate to standing, but rather related to the substantive merits of its appeal, a position which was accepted by the Board as a reason for ignoring that evidence. Secure Energy urged the Board to disregard Normtek's submissions going to the merits of its appeal. Interestingly, Secure Energy did provide some responses to Normtek's substantive submissions suggesting that they were either misleading or false. Unfortunately the Board, at the urging of both Secure Energy and the Director, declined to rule on this apparent conflict in the evidence. Clearly, resolution of that conflict would have assisted in determining whether or not Normtek was, in fact, directly affected.

[41] In fairness to the Board, the thrust of both Secure Energy and the Director's submissions was that Normtek had failed to show that the amending approval would harm a natural resource that Normtek used and the Board was persuaded by that argument. Secure Energy's solicitors conceded that Normtek did not have to demonstrate that it resided next to the landfill facility. But, they argued, Normtek nevertheless had to demonstrate a proximal connection between its use of a natural resource that would be harmed by the approval. Unless a natural resource near the landfill which Normtek used was being harmed, Normtek was not directly affected and standing ought not to be granted.

Director's Submissions on Normtek's Standing

[42] The Director, who two years prior had refused to accept Normtek's statement of concern because he was of the view that Normtek was not directly affected by Secure's application, also made submissions to the Environmental Appeals Board and opposed the granting of standing to

Normtek. The Director supported Secure Energy's motion to have Normtek's notice of appeal dismissed for lack of standing. We were not provided with a copy of the Director's submission; but we don't believe we were disadvantaged by this omission because much of it was reproduced in Normtek's response to the Director's submissions and in the Board's reasons for decision. The Director's submissions simply mirrored those advanced by Secure Energy.

[43] The Director did not respond to any of the regulatory concerns expressed by Normtek. The Director simply argued that Normtek's concerns were not tied to the environment and were simply due to the fact that Secure Energy was approved to engage in an activity that competed with Normtek. Normtek's main concern, the Director argued, was that the approval would eliminate demand for its decontamination services.

[44] The Director argued that the assertions of potential economic impacts were speculative and hypothetical. The Director argued that Normtek had provided no evidence to support its assertion that the need for decontamination would be eliminated or that the landfill disposal option would be cheaper.

[45] The Director reiterated the lack of geographic proximity and the absence of evidence of any harm to any natural resource which Normtek might use.

[46] The Director did not respond, either in its submission to the Board or in its factum in this appeal, to Normtek's argument that the acceptance limits in the approval did not comply with acceptance limits prescribed in the federal Guidelines for the Management of Naturally Occuring Radioactive Materials or the International Atomic Energy Association Regulations which were referenced in the approval. Nor did the Director respond to Normtek's argument that the acceptance limits in the approval represented a departure from generally accepted best practices.

[47] As an aside, one of the reasons the Director has typically been accorded "party" status on appeals of Director's decisions is that in order to assess the merits of an appeal of a Director's decision, the Environmental Appeal Board needs to understand the approval and the reasons therefor. But here the Director, who had already ruled that Normtek was not directly affected by Secure Energy's landfill approval application, took a position on Normtek's directly affected status. Whether that was appropriate, we leave for another day, although we note that it also troubled the reviewing judge. If the Director participates in a Board proceeding to determine a would-be appellant's standing, its contribution might appropriately be in the form of a response to the merits of the appellant's appeal, not in the form of an adoption of the position of the approval-holder with respect to the appellant's standing. Here the Director failed to assist the Board by not addressing the merits of Normtek's claims. Had the Director done so, it might have become apparent whether Normtek was directly affected or not.

Normtek's Rebuttal

[48] In separate letters dated September 19, 2016, Normtek replied to the submissions of both the Director and Secure Energy. The Board, surprisingly, characterized Normtek's letters as "improper rebuttal" notwithstanding that the process the Board prescribed provided for a "rebuttal submission" plus "any supporting materials" from Normtek by a certain date set by the Board. It is also not without significance that the Board's view of Normtek's rebuttal was that it did not result in any prejudice to Secure Energy because the Board considered much of the content of the rebuttal irrelevant to the issue of whether Normtek was directly affected. In other words, the Board gave Normtek's rebuttal short shrift on the issue of its directly affected status.

[49] Significantly, however, Normtek's rebuttal to the Director's submissions on its standing to appeal alludes to a potential factual dispute which appeared to have relevance to the issue of whether Normtek was directly affected by the Director's approval. The Director apparently had taken the position that he had not authorized acceptance of high activity radioactive waste at Secure's Pembina landfill. That issue required resolution if Normtek's directly affected status was to be properly determined because the International Atomic Energy Association's "Radioactive Best Practices (Recommended Practices)" document (IAEA, NORM Symposium 6) appeared to suggest otherwise and because the International Atomic Energy Association "Regulations" purported to be expressly incorporated in the approval for determining acceptance limits for NORM waste at the landfill. Normtek argued that International Atomic Energy Association classified low and intermediate volumes of pipe scale from the oil and gas industry as relatively high activity NORM. Normtek argued further that the Director, in approving up to 70 Bq/g as an acceptance limit for NORM waste, approved the landfilling of high activity radioactive waste, which appeared to be more than 10 times the radioactivity concentration limit for exempt materials which the federal and international guidelines apparently prescribed.

[50] Clearly this was an issue relevant to whether Normtek was directly affected because Normtek expressly conceded that if the approval did not include high concentrations of long-lived radionuclides, it would not be directly affected. Had the Board addressed the issue, Normtek's directly affected status, or lack thereof, might have been clearer.

[51] Normtek argued that the Director's approval of acceptance for landfilling of what it characterized as high activity and long-lived radioactive material would also cause environmental harm and that such environmental harm would directly affect Normtek. Normtek argued that its workers will be required to attend at the landfill to make deliveries of NORM and would thereby be exposed to radioactive dusts. Normtek claimed to have clients requiring NORM disposal in the vicinity of Secure Energy's landfill and further indicated that it would likely be making use of the Pembina landfill to dispose of some of the radioactive wastes of those clients.

[52] Normtek pointed out that the NORM waste management industry in Western Canada is still very small and in its infancy. The business of disposing of naturally occurring radioactive

waste in Alberta only began in the mid-1990s.[1] The Board itself noted that the Secure Energy landfill is "the first of its kind" in Alberta. Normtek argued that the approval was precedent-setting and was bound to directly affect industry participants. In Normtek's view, recommended radioactive waste management practices and methods of disposal were being changed as a result of the Director's decision.

[53] In its rebuttal of the Director's submission, Normtek reiterated that it would be commercially impacted by the approval because disposal is much less costly than decontamination and disposal. Normtek provided the relative costs. They were not challenged. Normtek argued that the approval would obviate the need for decontamination and down-hole disposal of high activity long-lived radioactive waste and that if such decontamination and disposal was no longer required, there would be an adverse effect on the environment. The anticipated impact on its business, Normtek argued, would result in harm to the environment. Normtek argued that issues of human health, safety, economic growth and sustainable development were all engaged by the Director's decision and were all part of the direct effect of the Director's decision on it.

[54] In its rebuttal to the approval-holder's submissions on standing, Normtek pointed out that none of the Board's many decisions on standing involved an approval to dispose of wastes which persist in potentially harmful states for hundreds of years (long-lived radionuclides). Normtek argued that it was precisely because the adverse effects of long-lived radionuclides are not immediate that their disposal requires separating them permanently from the biosphere.

[55] Normtek also argued that in an industry where there are few regulations governing radioactive waste management or landfill acceptance criteria, approval by the Director of acceptance of radioactive waste by a landfill directly affects those industry participants who are already in the business of decontaminating equipment and other media contaminated with radioactive material and then disposing of the radioactive waste in either landfills or in underground formations.

[56] The acceptance limits for NORM waste prescribed by the approval were those of the International Atomic Energy Association Regulations. The approval also required that the landfill be operated in accordance with the Canadian Guidelines for the Management of Naturally Occurring Radioactive Materials. Normtek's argument was that although the approval purported to be governed by these two very technical regulatory documents issued or adopted by the federal regulatory authority under the *Nuclear Safety and Control Act*, the limits prescribed in the approval

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[1] The issue of the safe disposal of Naturally Occurring Radioactive Wastes gained currency in the late 1980's with the filing of a claim in the U.S. District Court for the Southern District of Mississippi in *Street v Chevron USA Inc*, which was ultimately settled in the early 1990's for millions of dollars and was popularized in a book written by the plaintiff's lawyer, Stuart H. Smith entitled *Crude Justice* (Barbella Books Inc: Dallas TX, 2015). See also James R Fox, "Naturally Occurring Radioactive Materials in the Oilfield: Changing the Norm" (1992-1993) 67 Tul L Rev 1197 and RM Edmonson, MR Jelliffe, KN Holwand, "Naturally Occurring Radioactive Material (NORM)-A Primer" (1997) 16 E Min L Inst. Ch. 2.

itself were not in accordance with those documents and that the regulation of the NORM waste disposal industry was being changed as a consequence. As an industry participant, Normtek argued it was being directly affected by having to comply with these regulatory guidelines while another industry participant was not so required. Normtek also submitted that the effect of this relaxation of standards would be a detrimental effect on the environment.

Environmental Appeal Board's Decision on Standing

[57] The Board's decision on standing began with descriptions of the written submissions of the appellant, the approval holder and the Director. There was then a review of previously decided cases which Normtek's counsel took issue with because it was almost a word-for-word copy of case law reviews the Board had utilized in a number of previous decisions. We found the review to provide a helpful roadmap of the prior jurisprudence and suspect others would too. We take no issue with the Board's "cutting and pasting", if that is what it was, because the Board later engaged in analysis specific to this case.

[58] The Board's decision was that Normtek did not provide sufficient evidence to demonstrate that it was directly affected by the amending approval. The Board's reasons were that Normtek's concerns were primarily commercial or economic and that Normtek failed to demonstrate that its use of a natural resource would be affected by the amending approval.

[59] With respect to what the Board characterized as Normtek's economic concerns, the Board dismissed them for what appears to have been four reasons. First, the Board said the economic concerns did not relate to the use of a natural resource near the landfill. Second, the Board said the appellant's economic concerns were based solely on a concern about increased competition. Third, the Board said the appellant's economic concerns were speculative. And fourth, the Board found that the appellant failed to demonstrate a causal connection between the alleged economic impact and the amending approval. To quote the Board, at paragraphs 147 and 148:[2]

> In this case, the Appellant did not provide any evidence to show how its business relies on natural resources that would be impacted by the proposed project....The Appellant's economic interest does not rely on the natural resources near the Landfill. The Appellant's economic concerns are based on increased competition. It is not within the Board's jurisdiction to determine the saturation point of a particular industry. It is also not the Board's jurisdiction to determine what disposal method industry should use....
>
> In the Board's view, the Appellant's argument that it is directly affected because of an economic impact fails on two grounds. First, the argument is speculative; the Appellant has not provided sufficient evidence even in a *prima facie* basis to

[2] *Normtek Radiation Services Ltd v Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, re: Secure Energy Services Inc* (2 March 2018), Appeal No 16-024-D (AEAB) .

> demonstrate it is directly affected. Second, the Appellant's argument does not demonstrate an adequate causal connection between the economic impact it is alleging and the Amending Approval being appealed. The Appellant's argument is that the Amending Approval will cause an economic effect, which in turn will cause an environmental effect. This is too remote a connection to establish that the Appellant is directly affected.

[60] With respect to what the Board found was Normtek's failure to demonstrate that its use of a natural resource near the landfill would be affected, the Board had this to say at paragraph 166:

> For the Appellant to be directly affected, they need to demonstrate on a *prima facie* basis either they will be impacted from radiation coming from the Landfill or that their use of a natural resource will be impacted by radiation coming from the Landfill.

At paragraph 161:

> The Board looks at the use of the natural resource in the area of the project. If a person uses the resources once in a lifetime, it is not sufficient to be found directly affected, nor is the possibility a person may use the resource in the future. Actual use is required, and arguments regarding this use must be supported by evidence, not just generic statements. [underlining in the original]

Judicial Review of the Environmental Appeals Board's Decision on Standing

[61] Normtek applied to the Court of Queen's Bench to have the Environmental Appeals Board's decision judicially reviewed. Specifically, Normtek sought an order quashing the Board's standing decision and remitting the matter back to the Board for a determination in accordance with the Court's directions.

[62] Normtek's main argument was that the Board erred in law by giving an unduly restrictive interpretation of the phrase "directly affected" in s 91(1)(a)(i) of the *Environmental Protection and Enhancement Act*, contrary to what the Act and its purposes contemplated. Normtek also argued that the Board erred in holding that it had no discretion to hear an appeal of an approval by a person not directly affected but with a genuine interest in an issue of public interest raised by the granting of the approval.

[63] Normtek's application for judicial review was dismissed. The reviewing judge found that the Board's interpretation of the phrase "directly affected" in s 91(1)(a)(i) of the Act was reasonable. The reviewing judge also found that the Board's application of its interpretation of "directly affected" was also reasonable. And finally, the reviewing judge found that the Act does not permit a person who is not directly affected by a decision of the Director to appeal a Director's decision.

[64] The reviewing judge endorsed the Board's view that in order to be directly affected the harm caused by the approval cannot be speculative and that there must be a direct causal connection between the economic harm and the approval. The reviewing judge also held that even assuming a direct economic effect which was not speculative, Normtek had to demonstrate a connection between the economic harm and an effect on the environment. The required connection between the economic harm and an environmental impact, she said, might be established by demonstrating that the approval would harm a natural resource that the appellant uses or would harm the appellant's use of a natural resource (para 66). The reviewing judge also expressed the view that it was not the role of the Board to become an economic regulator.

[65] The reviewing judge then went on to assess whether the Board's application of its "directly affected" test was reasonable and concluded that it was. She expressed reservations about the Board's characterization of Normtek's evidence of harm as being "speculative". But she said, "of larger importance" was the Board's determination that Normtek had failed to satisfy it that Normtek was "directly" affected by the approval, as opposed to simply being affected by it. That distinction is not clear to us. She also suggested that an economic effect in the future is not a direct effect. We disagree. All direct effects of Director's decisions to approve activities, including the economic effects, are in the future. The reviewing judge also endorsed the Board's view that the connection between the direct effect on Normtek and the harm to the environment was too remote. We question whether such a connection is even required.

[66] With respect to Normtek's argument that the Board failed to consider certain of Normtek's substantive submissions because they related to the merits of the appeal, the reviewing judge found that the Board reasonably exercised its discretionary authority in deciding it had sufficient information to decide that Normtek was not "directly" affected without considering the merits of the appeal. This ruling was made notwithstanding the reviewing judge's view that "[a]n exploration of the merits of the appeal may or may not support a stronger case for potential harm to the environment or human health and safety"(para 95). Nevertheless, the reviewing judge found that "an assessment of the merits of the appeal in this case does not assist Normtek in demonstrating that it is 'directly affected' by the Amending Approval" (para 95).

[67] The reviewing judge then went on to consider whether the Board had a discretion to hear Normtek's appeal even if it was not directly affected and concluded that the Board did not have such discretion. In so doing, she relied on the decision of Hall, J. in *Alberta Wilderness Association v Alberta (Environmental Appeal Board)*, 2013 ABQB 44 in which wording similar to section 95 of the *Environmental Protection and Enhancement Act* employed in the *Water Act*, RSA 2000, c W-3 was considered. The court in the *Alberta Wilderness Association* case held that the Environmental Appeal Board only has the jurisdiction which is expressly granted to it by the provisions of the statute. We agree.

[68] In the result, the reviewing judge concluded that she could not accept that the Board's interpretation of "directly affected" or its refusal to read section 95(a)(ii) as creating a statutory authority permitting public interest appeals to the Board subverted the intention of the legislature,

the purposes of the Act or the principles of administrative law. She dismissed Normtek's application for judicial review.

Standard of Review

[69] The issue on this appeal is whether, the Board employed an unduly restrictive, and therefore unreasonable, interpretation of the phrase "directly affected" in denying Normtek standing.

[70] The Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 was rendered December 19, 2019, just prior to the hearing of this appeal on February 11, 2020. As a consequence of the *Vavilov* decision, the parties agreed that the standard of review analysis begins with the presumption that reasonableness is the applicable standard to be applied to the Board's decision and that the presumption of reasonableness was not rebutted in this case.

[71] The Supreme Court in *Vavilov* provided suggestions with respect to the proper application of the reasonableness standard, what the standard entails and how it might be applied in practice. The Supreme Court said courts may intervene in quasi-judicial administrative matters where it is necessary to do so to safeguard the legality, the rationality and the fairness of the administrative process. Otherwise, the starting point is one of restraint (respect or deference to the administrative tribunal's decision). Specifically, the Supreme Court had this to say in its headnote about applying the reasonableness standard:

> In conducting reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale, to ensure that the decision as a whole is transparent, intelligible and justified. Judicial review is concerned with both the outcome of the decision and the reasoning process that led to that outcome.

[72] With respect to matters of statutory interpretation, the Supreme Court had this to say, again in its headnote:

> Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Where this is the applicable standard, the reviewing court does not undertake a *de novo* analysis of the question or ask itself what the correct decision would have been. But an approach to reasonableness review that respects legislative intent must assume that those who interpret the law, whether courts or administrative decision makers, will do so in a manner consistent with the modern principle of statutory interpretation. Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. But whatever form the interpretive exercise

> takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision.

[73] Consistency with the text, context and purpose of the statue then are the hallmarks of reasonable statutory interpretation. Quoting the Court at paragraph 118:

> Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker.

[74] Finally, the Supreme Court in *Vavilov* said that reasonableness requires the decision-maker to take into account the evidentiary record which bears on the decision and its decision must be reasonable in light of that factual matrix (para 126):

> The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it.

Court of Appeal's Analysis

Interpretation of "Directly Affected"

[75] At the heart of this appeal is an issue of statutory interpretation: the interpretation of what "directly affected" means. The so-called modern approach to statutory interpretation can be found in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193, citing Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Buttersworth, 1983) at 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

As Iacobucci J observed in *Rizzo*, this means statutory interpretation is not simply an exercise in reviewing the words of the legislation in isolation. Instead, a court must ask what is the purpose of this legislation, and in light of that purpose, what must the words mean? If a possible meaning runs counter to the scheme of the legislation, then that potential interpretation may be suspect.

[76] Ruth Sullivan, in *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) suggested the central principle articulated by Dreidger and the courts has three elements. A valid interpretation of legislation must be:

1. plausible in that it complies with the legislative text,
2. efficacious in that it promotes the legislative intent, and

3. matches accepted legal norms in that the interpretation is reasonable and just.

[77] To start with, the use of the phrase "directly affected" must be interpreted as limiting the class of persons who can appeal an approval. But notwithstanding that, the generality of the phase can also be interpreted as conferring broad discretion on the Board to decide who is directly affected by a Director's decision.

[78] Secondly, trying to define in advance or limit the circumstances in which an appellant might be found to be directly affected is something the Environmental Appeals Board wisely avoided for at least the first decade of its existence. When one has regard for the many and diverse approvals, environmental protection orders and contaminated site designations which may be appealed by "directly affected" persons, it is apparent that trying to define the way in which a person must be directly affected in order to be accorded standing is impossible.

[79] It is not disputed that the words "directly affected" must be given their ordinary meaning. The Board canvassed the ordinary meaning of "affected" in its 1998 decision *Bildson v Acting Director of North Eastern Slopes Region, Alberta Environmental Protection, re Smoky River Coal Limited*[3] at paragraph 25. The dictionary employed by the Board yielded "harmed or impaired" as one meaning for "affected". On that basis, the Board concluded that an appellant must be harmed or impaired by the activity authorized by the approval being appealed. In other words, the Board interpreted "affected" to mean adversely affected. The distinction between directly affected and adversely affected arises when others who are directly benefitted by the approval seek standing to support the Director's decision which is being appealed by a party who is directly and adversely affected. The *Concise Oxford Dictionary* which we consulted similarly defines the adjective "affected" as "attacked (as by a disease)" or "acted upon physically". It defines the verb "affect" as "attack (as disease)" and as "producing a material effect on". These meanings are not unlike those found by the Board over 20 years ago. And so, we too conclude that, without more, "directly affected" connotes directly affected in an adverse fashion.

[80] Significantly, in *Bildson*, the Board rejected what it termed a *per se* rule employed by the Director not unlike that which the Board itself employed in this case:

> The Directors *per se* rules on the types of harms which can and cannot qualify for standing purposes cannot reasonably be supported by the open-ended nature of the plain meaning of "affected".

[3] *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, online: Alberta Environmental Appeal Board < http://www.eab.gov.ab.ca/dec/98-230-D.pdf>.

All we can do is reiterate the Board's caution in *Bildson* against "*per se* rules" and apply it to the rather narrow or restricted interpretation of the phrase "directly affected" employed by the Board and confirmed by the reviewing justice in the *Normtek* case.

[81] The adverb, "directly" also restricts or limits the effects which can give rise to standing. The *Concise Oxford Dictionary* defines "directly" as meaning "in a direct manner". It defines "direct" as "straight, not crooked or roundabout, following an uninterrupted chain of causes and effect". There also appears to be a temporal aspect to "direct" and "directly". "Direct" is defined as "immediate". And "directly" is defined as "at once, without delay." It is acknowledged that some types of prospective harm may be too remote or too speculative, but not all will be.

[82] It can be seen from the forgoing that limiting "directly affected" to impacts on the appellant's use of natural resources affected by the activity approved by the Director is not supported by a plain reading of s 91(1)(a)(i) of the Act which requires only that the appellant be "directly affected by the Director's decision", however that direct effect manifests itself.

[83] Nor does the Act itself support a limitation based on a person's use of a "natural resource" in the vicinity of the approved activity. Nowhere in the *Environmental Protection and Enhancement Act* are the impacts on natural resources inextricably linked to standing. The term "natural resource" is rarely, if ever, employed in the Act. What is defined and employed is the term "adverse effect". It is defined in s 1(b) of the Act as the impairment of or damage to the environment, human health, safety or property. In other words, if one's health, safety or property is potentially impaired by the decision of the Director's approving an activity, that person may be directly affected and therefore have standing to appeal the Director's decision, regardless of whether that person's use or enjoyment of the environment or a natural resource is likely to be impacted.

[84] Another indication of the kinds of effects which were intended by the legislature's use of the phrase "directly affected" is found in the Director's power to amend a term or condition of an approval. Section 70(3)(a)(i) of the Act states that the Director may amend an approval if, in his or her opinion, an adverse effect (an impairment of or danger to the environment, human health, safety or property) is occurring or may occur. It would be incongruous for the Director to be conferred with jurisdiction to interpret the phrase "directly affected" in section 73(1) of the Act more broadly than the Board in section 95(5)(a)(ii).

[85] Section 40 of the *Environmental Protection Enhancement Act* also provides some indication of what effects might have been contemplated as causing a person to be directly affected. Section 40 states that the purpose of environmental assessment, among other things, is to predict the environmental, social, economic and even cultural consequences of a proposed activity and to assess plans to mitigate any adverse impacts resulting from the activity. While the proposed activity in this case was not deemed to have warranted consideration under the formal environmental impact assessment process established under Division 1 of the Act (ss 40-59), the Director is nevertheless obliged by the Act to consider the environmental, social, economic and

cultural consequences, if any, resulting from the proposed activity, as well as issues related to human health. Considerations relevant to the granting of an approval for a designated activity are not confined to impacts on natural resources. Nor are they even confined to impacts on the environment. And so the phrase "directly affected" could not be limited to impacts on one's use of natural resources. Social, economic, cultural, safety, human health effects, if established, could also ground standing, as could adverse effects on property rights. They are all specifically mentioned in the *Environmental Protection and Enhancement Act*. If the direct effect on the person seeking to appeal a Director's decision is economic, cultural, safety or health-related or is on a property right, then standing to appeal may be available whether or not there is any connection to an environmental impact to a natural resource proximate to the site of the approval as suggested by the Board and the reviewing court.

[86] The Board's interpretation of "directly affected" as requiring the would-be appellant to establish that the Director's decision would harm the appellant's use of a natural resource near the approved activity is not only not consistent with the Act, but also is not supported by many of the Board and court decisions which the Board cited, beginning with the Board's decision in *Dr Martha Kostuch v Director, Air and Water Approvals Division, Alberta Environmental Protection*[4] two years after the *EPEA* was enacted and the Board was set up.

[87] The late Martha Kostuch was a Rocky Mountain House veterinarian and environmental activist who wished to appeal a Director's decision to amend an approval for an existing cement plan 35 miles from her home. When asked how she was directly affected, Dr. Kostuch stated the plant's emissions (CO_2, particulates, nitrogen oxide and heavy metals) directly affect her because she recreated in areas near the plant (i.e., she used the area near the cement plant to hunt deer).

[88] The Board's decision was instructive. The Board made it clear that no one test for determining whether an appellant is or will be directly affected is likely to be found. Quoting from the beginning of the Board's discussion of the standing issue:

> Since the Board's inception in 1993, we have received more than 60 appeals and, like the appeal before us, many of those appeals have raised the question of "directly affected". We have not found a universal, simple and easy test to determine when a person is "directly affected" which can be applied automatically in all cases. We believe that this determination should be made on a case by case basis, taking into account the varying circumstances and facts of each appeal.

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[4] *Dr. Martha Kostuch v Director, Air and Water Approvals Division, Alberta Environmental Protection* (23 August 1995), Appeal No. 94-017, online: Alberta Environmental Appeal Board < http://www.eab.gov.ab.ca/dec/94-017.html>.

This echoed what Justice Laycraft of this Court said about the Local Authorities Board in the context of an annexation hearing (*Leduc (No 25) v Local Authorities Board* (1987), 84 AR 361 at paras 11-12, 54 Alta LR (2d) 396 (CA)):

> If the section is to be construed as requiring the person proposing to intervene to show with certainty that his rights will be affected, how is he to do it? A tribunal cannot know with any certainty at the start of the hearing what the proceeding will involve. The only certain way to determine that would be to require each person to call evidence on the point. In the present case, Mr. Zajes would presumably be forced to call enough evidence to establish the potential for a serious effect on him if the proposed annexation takes place. That would be to force him to succeed on the principal issue in the hearing before he has a right to appear in it, which in our view would be applying the statute to bring about an absurd conclusion. On the other hand, if the Board were required to wait until the petitioning City had called evidence as to the effect of annexation and that had been answered by the other parties, the hearing would be virtually completed before the preliminary question of who are to be parties could be answered. Meanwhile, would those seeking status be permitted to take part?
>
> In our view, the legislature cannot have intended that degree of certainty in this definition. The overriding purpose sought to be achieved by the *Administrative Procedures Act* is fairness in the administrative process. The Board must ensure that those persons with a serious interest in the proceeding are fairly heard. At the same time, it must protect itself, and the legitimate parties to the hearing, from having the whole proceeding complicated and made more expensive by those with no real interest at stake. The Board, by the nature of its task, is bound to make its ruling at an early stage of the proceeding. It is bound to rule fairly on a balance of probabilities whether the hearing has the potential to affect or vary a person's rights given the variations in result possible at the conclusion of the hearing. [emphasis in original]

[89] In *Kostuch*, the Board denied Dr. Kostuch standing on the basis that her use of areas near the cement plant, which she claimed gave her standing, would not be adversely affected by amending the existing plant's approval. The Board's decision was upheld on judicial review by Justice Marceau in *Kostuch v Alberta (Director, Air & Water Approvals Divisions, Environmental Protection)*(1996), 182 AR 384, 35 Admin LR (2d) 160 (QB). But to understand the relevance of this decision to the within appeal, it must be kept in mind that Dr. Kostuch's claim to be adversely affected was based on her use of areas near the plant for hunting deer. Her use of the area near the plant was the basis of her claim to be directly affected. The Board was not convinced that her use of those areas would be directly affected; but there was no suggestion that use of the land proximate to the approved activity was the only way one might be directly affected.

[90] The Board's interpretation of "directly affected" as requiring an appellant to establish that the Director's decision will harm a natural resource which the appellant uses in the vicinity of the approved activity may have had its genesis in the Board's 1998 decision in *Bildson* (cited earlier at para 80) because the Board's analysis in *Bildson* was relied upon by Justice McIntyre for the "test" he employed for determining whether the appellant was directly affected by the Director's decision in *Court v Alberta Environmental Appeal Board*, 2003 ABQB 456. Justice McIntyre's "test" in *Court* was, in turn, relied upon by the Board in the case before us for determining whether the appellant was "directly affected".

[91] In *Bildson*, the Director had approved an extension to an existing open pit coal mine 20 km northwest of Grande Cache Alberta. In the process, the Director also amended a wastewater discharge approval.

[92] The appellant Bildson filed a notice of appeal of the Director's decision on the basis that the approved activities were likely to adversely affect wildlife and water quality in the area.

[93] The Director responded by urging the Board to dismiss Mr. Bildson's appeal on the basis, *inter alia*, that he was not directly affected by the decision. The Board declined to dismiss Mr. Bildson's appeal.

[94] It is also significant that in declining to dismiss Mr. Bildson's appeal, the Board began by indicating that it considered it necessary to consider the merits of Mr. Bildson's objections in order to decide whether Mr. Bildson was directly affected. The merits of Mr. Bildson's objections revolved around the fact that he lived in Grande Prairie, miles from Grande Cache and the mine site. However, he used an alpine area near the mine site for a family-run business. That business involved taking clients out to the backcountry. Mr. Bildson claimed the mine expansion would impair the aesthetic value of the area.

[95] The Director argued that the only direct effect which suffices for standing is harm to a legal right or entitlement. Ironically, given its position with respect to Normtek's appeal, the Director also argued in *Bildson* that harm to a natural resource or to a person's use of a natural resource in the area of the approved activity did not constitute a direct affect because no legal right or entitlement was being affected. The Board disagreed and it was in the context of that disagreement that the Board made the statement upon which Justice McIntyre in *Court* and the current Board in *Normtek* relied. Here's what the Board in *Bildson* had to say:

> The Board does not intend its discussion above to mean that injury to a legal right or entitlement is irrelevant to an appellant's ability to demonstrate standing, because it is relevant. The point is simply that it is not a prerequisite to standing nor even, as Smoky River Coal's fall-back position would suggest, "an extremely significant factor," in demonstrating standing. 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.

[96] We would say the same thing in the context of the Normtek appeal. We do not suggest that harm to a natural resource which an appellant uses or harm to an appellant's use of natural resource would not be sufficient to establish directly affected status. It is simply not a necessary prerequisite to establishing standing where other adverse effects are alleged. It is not only conceivable, but it also has happened, that appellants who had no concern about the environment and who made little use of it were found to be directly and adversely affected by Directors' decision. Examples include persons faced with the prospect of vacating their homes, changing the way they farm, conduct business, develop their lands or plan their enterprises as a result of an activity approved by the Director. This has happened in cases involving the creation of irrigation reservoirs on dry land, storm water retention ponds, off-stream reservoirs for flood control to name but a few projects which require *Environmental Protection and Enhancement Act* or *Water Act* approvals. Sometimes parties who made no use of natural resources near the project nevertheless faced the prospect of other adverse effects. In such cases, the parties' directly affected status was not questioned and, as a consequence, there are few decided cases on point.

[97] In *Bildson*, the Board said this of the Director's argument that one could only be directly affected if legal rights or entitlements were being affected:

> the logical conclusion of the Director's position is that someone can be physically affected by a project to the point of death, but still lack standing to appeal an approval for the project if the person does not own land, or have a lease, or licence that is also affected by the project.

Likewise, the logical conclusion of the position taken by the approval-holder and the Director in Normtek's case, which appears to have been adopted by the Board, is that someone can by physically affected by an approved activity to the point of death, but still lack standing to appeal if that person's use of a natural resource is not being directly affected. We too exaggerate to make the point.

[98] Also, as noted above, the Board had the same concern in *Bildson* we have in this case. The lack of evidence adduced by the Director and the approval-holder on the "directly affected" issue was commented on in *Bildson*:

> In its written submission, Smoky River Coal similarly asserts that Mr. Bildson's evidence "fails to demonstrate.., that he will suffer specific harm.., that is directly attributable to approvals under appeal." However, the company's submission provides no evidence to support, nor even makes any attempt to explain, this conclusory assertion.

The Director and approval-holder's submissions in the case at bar expressly declined to engage the appellant on the merits of its evidence, other than to argue that the appellant failed to establish a direct effect.

[99] On the issue of causation and the import of the word "directly" in "directly affected", the Board in *Bildson* had this to say:

> The Board has long interpreted the term "directly" to mean that there must be an unbroken chain of causation between the project in question and a harm to the appellant. Obviously, the stronger the links in the chain--i.e, the greater the proof that the appellant will be harmed and that the harm stems from project in question-the more likely the Board will find that an appellant has standing. However, the Board has not construed "directly" so narrowly as to preclude standing simply because there are intermediate links between the project and the appellant's harm.

[100] In summary, the Board found in *Bildson* that the appellants' use of the area near the mine expansion sufficed to establish *prima facie* that he was directly affected. However, impacting the use of natural resources near an approved activity was not suggested to be an exhaustive interpretation of "directly affected".

[101] In *Court*, Justice McIntyre, citing *Bildson*, might unwittingly have been perceived to have elevated the proposition that an appellant may show that the approved activity will harm a natural resource in order to be accorded standing to the proposition that an appellant must show that it will do so. The Board in *Normtek*, relying on *Court*, certainly appears to have considered this the test which must be met in order to be accorded standing.

[102] In *Court*, the proposed activity was a gravel extraction operation less than a half a mile from the appellant's home in a country residential subdivision along the Bow River south and east of Calgary. Following a two-day hearing of the merits of her objections, the Environmental Appeals Board found that Ms. Court was not directly affected by the Director's decision to approve the gravel extraction operation. The Board's reason was that the appellant's real concern was the adverse effects of three other existing sand and gravel operations near her home. The appellant, Ms. Court, an asthmatic, had argued that she was directly affected because dust and other air pollutants and noise from existing gravel operations impacted her and so, presumably, would the approved one. It was not her use of a natural resource near the approved activity which was the basis of her claim to be directly affected. It was her health.

[103] Justice McIntryre found the Board's decision on Ms. Court's standing to be patently unreasonable and remitted the matter back to the Board to be dealt with on the basis that the appellant was entitled to standing. He held that the Board applied a patently unreasonable test for determining the appellant's standing; although, upon review of the Board's decision in *Court*, it is not clear that the Board employed any particular test. Nor did Justice McIntyre explain why the Board's conclusions were patently unreasonable. Justice McIntyre cited with approval the test

employed in *Bildson*, but did not elaborate on how he applied it. He simply concluded that Ms. Court had established, on a *prima facie*, but rebuttable basis, that there was a potential or reasonable probability that she would be harmed by the approval of the gravel extraction operation without any direct reference to the test he articulated.

[104] Justice McIntyre's review of the Board's decision in *Court* also revolved around the reasonableness of the Board's decision to defer its ruling on Ms. Court's standing until it had heard the merits of Ms. Court's appeal. The Board had decided that it would "assume without deciding" that Ms. Court was directly affected and that it would decide the directly affected issue as part of the hearing of the appeal. Justice McIntyre found this procedural decision to be patently unreasonable and contrary to the logic of Justice Laycraft of this Court in *Leduc (No 25)* (see para 88 herein). Without opining on whether we would have found the procedure adopted by the Board to be unreasonable, the Board's dilemma in *Court* illustrates the need for at least some consideration of the merits of the appellant's objections or concerns in order to determine whether an appellant is directly affected. Certainly Justice Laycraft in *Leduc (No 25)* thought that some consideration of the merits was appropriate. Often, the issue of directly affected before the Environmental Appeals Board is inextricably linked to the substantive issues of the appeal. In *Normtek*, the Board declined to get into any of the merits of Normtek's objections.

[105] In short, we are of the view that the Board and the chambers judge were unreasonable in concluding that an adverse impact cannot qualify a person as being "directly affected" unless the adverse impact is on the appellant's actual use of a natural resource near the activity which the Director has approved. The Board's view is not supported by the Act or its own jurisprudence. Nor does Justice McIntyre's decision in *Court* justify the adoption of such a test for standing.

Alleged Regulatory, Economic and Environmental Impacts of the Director's Decision

[106] In its decision, the Board also characterized Normtek's concerns as being "primarily economic" and then dismissed them as providing standing because they were speculative and because they did not meet the test of having to relate to the use of a natural resource being affected by the Director's decision (the approval of disposing of certain NORM in a landfill). At paragraph 148:

> In the Board's view, the Appellant's argument that it is directly affected because of an economic impact fails on two grounds. First, the argument is speculative; the Appellant has not provided sufficient evidence even on a *prima facie* basis to demonstrate it is directly affected. Second, the Appellant's argument does not demonstrate an adequate causal connection between the economic impact it is alleging and the Amending Approval being appealed. The Appellant's argument is that the Amending Approval will cause an economic effect, which in turn will cause an environmental effect. This is too remote a connection to establish that the Appellant is directly affected.

[107] We begin our analysis with the Board's understanding of Normtek's concern. It appears that the Board began with a proper understanding that Normtek's appeal was based on a concern about its business being directly and adversely affected "due to the change in the way AEP is regulating radioactive materials" as reflected in the Director's decision. But the Board then proceeded to decide the issue of Normtek's directly affected status as if the concern was simply one of fear of competition. At paragraph 135 the Board said:

> Putting aside the evidence and arguments that go to the merits of the appeal, in response to the question as to how it is directly affected, the main argument put forward by the Appellant is that its business will suffer because of the issuance of the Amending Approval. Specifically, the Appellant argued it is directly affected because it will suffer significant economic losses resulting from the competition created by the Director's decision to issue the Amending Approval.

Again, we have the Board putting aside the evidence and arguments which went not only to the merits of the appeal but also to Normtek's directly affected status. Indeed, as we will see later, the Board considered that evidence and those arguments irrelevant to the decision it had to make.

[108] The Board characterized Normtek's economic argument as being similar to those advanced by Byram Industries in *Byram Industrial Services Ltd. v. Director*[5].

[109] *Byram Industrial* was a case in which the appellant, a landfill operator, was opposing the approval of a new landfill 50 km away from its existing landfill. Byram Industries' argument was that the new landfill would serve the same geographic area and thereby impact it economically making its business less profitable, perhaps not even viable, and the consequent oversupply of landfill capacity would jeopardize the proper disposal of industrial waste. Byram Industries argued that the economic impact of the new landfill on it would result in an environmental impact. The Board found that the economic impacts predicted by the appellant were speculative in that the evidence failed to persuade the Board that the economic viability of the appellant's landfill would be directly and adversely affected.

[110] The Board in *Normtek* interpreted the Board's decision in *Byram Industrial* as holding that an approval resulting in an economic impact leading to an environmental impact was insufficient to demonstrate a direct effect because the connection is too remote. However, that is not what the Board in *Byram Industrial* held. The Board simply held that they were not satisfied that the economic impact had been established. With respect to economic impacts which are established and which in turn result in an environmental impact, the Board in *Byram Industrial* made it clear that they could provide standing to appeal:

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[5] *Byram Industrial Services Ltd v Director, Central Region, Regional Services, Alberta Environment re: Wasteworks Inc* (28 April 2005), Appeal No. 04-057-D, online: Alberta Environmental Appeal Board < http://www.eab.gov.ab.ca/dec/04-057-D.pdf>.

> Environmental effects as a result of economics are a valid concern. One of the purposes of *EPEA*, as stated in section 2(b) is "…to support and promote the protection, enhancement and wise use of the environment while recognizing … the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning…." This suggests to the Board an obligation on the Director's part to assess economics when reviewing an application.
>
> The Board has in previous decisions determined a person is directly affected based on direct environmental impacts and direct economic impacts as a result of environmental impacts, but the Board also sees there is the possibility of a direct economic impact with an indirect environmental impact being the basis of standing. Indirect environmental effects can be just as significant as direct environmental impacts.
>
> Therefore, it is important for the Director to at least consider the economics of a proposal, since there is a possibility economic effects may ultimately impact the environment. If an environmental impact assessment had been required, the economics of the proposal, as well as alternatives, would have been analyzed…

Here the Board was referring to section 49(d) and (e) of the *Environmental Protection and Enhancement Act* which requires the Director to consider the economic impact of the proposed activity and to analyze its significance.

[111] The Board in *Byram Industrial* went on to say that the commercial viability of a business facilitating environmental protection was a "potentially viable argument regarding indirect effects on the environment" of the direct economic effect on the appellant. The reason the Board dismissed the appeal was that the appellant failed to provide better evidence of the effect on it. But it did not hold that an economic impact which leads to an environmental impact could not found standing.

[112] The *Byram Industrial* case is also distinguishable because the anticipated economic impact there arose out of the fact of competition. In *Normtek*, the anticipated economic impact was said to arise out of what was characterized as a fundamental change in the regulatory regime governing the disposal of NORM. Normtek repeatedly told the Board that it did not compete directly with landfill disposal of radioactive wastes. Indeed, it gave evidence it made use of such landfills and anticipated using the approval-holder's landfill as well.

[113] The issue of the economic impacts of an environmental approval came before the Board in connection with an appeal of a water treatment plant approval which threatened to impose a financial obligation on the appellant, the purchaser of power from a power plant under a Power

Purchase Agreement. In *Enron Canada Power Corporation v Director*,[6] the Director issued an approval to TransAlta Utilities Corporation for the construction of a water treatment plant at its Sundance Power Plant in order to mitigate the impact of TransAlta's operations on Lake Wabumun. Enron Canada Power Corporation claimed to be directly affected by the approval because, under its power purchase arrangements with TransAlta, it might be liable to pay for the water treatment plant.

[114] Enron opposed the approval to the extent that it imposed an obligation on it to contribute to the cost of the water treatment plant. TransAlta, the approval-holder, questioned Enron's directly affected status. The question before the Board was whether the interest claimed by Enron was sufficient to permit it to appeal the approval.

[115] The Board found that Enron was not directly affected by the Director's decision approving the water treatment plan because its challenge was not aimed at the Director's decision but at a commercial dispute with TransAlta which had the potential to affect its financial and economic interests.

[116] However, the Board did not foreclose the possibility of entertaining appeals by appellants whose economic interests were affected by a Director's decision, whether or not the effects on those economic interests caused environmental impacts:

> Second, Enron claimed the Board's jurisdiction can include economic interests. We agree. However, in the history of the Board thus far, the economic interest has always been *tied to environmental interests as a matter of both fact and law*. … While Enron has tried to present an environmental case, Enron's purpose is primarily, if not exclusively, economic. The Board does not believe that Enron really had any environmental interest in mind when arguing that the Water Treatment Plant should be smaller than proposed. [emphasis in original]

In the case at bar, Normtek's economic interests were said to be inextricably tied to environmental impacts.

[117] In rejecting Normtek's claim to be directly affected economically, the Board also relied on its decision in *Gadd v Director*[7]. *Gadd* was a case, like *Bildson*, where the appellant's business (eco-tourism) was potentially being directly affected by the Director's approval of a coal haul road from Cardinal River Coals' Cheviot mine to Luscar's coal processing plant downstream. Ben Gadd

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[6] *Enron Canada Power Corporation v Director, Northern East Slopes Region, Regional Services, Alberta Environment, re: TransAlta Utilities Corporation* (26 June 2002), Appeal No 01-081-D, online: Alberta Environmental Appeal Board <http://www.eab.gov.ab.ca/dec/01-081-D.pdf>

[7] *Preliminary Motions: Gadd v Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd* (8 October 2004), Appeal Nos. 03-150, 03-151 and 03-152-ID1, online: Alberta Environmental Appeals Board < http://www.eab.gov.ab.ca/dec/03-150-152-ID1-Cardinal%20River-Oct%208,%202004.pdf>.

was an appellant who made use of natural resources in the area where the Director had approved the coal haul road. The Board concluded that Mr. Gadd was directly affected because he had provided evidence to indicate that his economic livelihood could be affected. However, the Board in *Normtek* used *Gadd* case to disregard any potential economic impact which was not a result of its use of natural resources in the area of the proposed activity. To quote the Board,

> The Appellant's [Normtek's] economic interest does not rely on the natural resources near the Landfill. The Appellant's economic concerns are based on increased competition. It is not within the Board's jurisdiction to determine the saturation point of a particular industry. It is also not the Board's jurisdiction to determine what disposal method industry should use.

[118] The economic interest which Normek argued was directly affected was based on its interest in ensuring that naturally occurring radioactive materials are managed in accordance with generally accepted regulatory standards to which it said it was required to adhere. Properly understood, Normtek's concern was as much regulatory concern as it was an economic or commercial concern. Normtek argued that the Director's decision directly affected its interest, as an industry participant, in a regulatory regime which governed its industry in the interests of protecting the environment. It is hard to think of a better basis for standing before the Environmental Appeals Board than a concern about a regulatory decision which is alleged to adversely impact a party economically and which also may have implications for environmental protection, particularly when the regulatory decision permits an activity which involves the disposal of a substance of concern under the *Environmental Protection and Enhancement Act* (i.e. radiation). The foregoing, of course, assumes that there is merit to Normtek's substantive submissions which the Board, at the urging of the Director and approval-holder, ignored.

[119] Section 91(1) of the Act provides that a person who is directly affected by the Director's decision may submit a notice of appeal. Ordinarily, the adverse effects which found standing are the anticipated adverse effects of the activity which the Director's decision approved. But the Director's decision itself may also directly affect an industry participant.

[120] Normtek's standing argument was as much directed at the Director's decision as it was at the activity which Secure Energy obtained approval to engage in. The "interest" which Normtek argued was directly affected was its interest in ensuring radioactive materials are managed in a manner which it claimed complied with generally-accepted regulatory standards which it was required to observe. Normtek claimed it was in the business of managing radioactive material in an environmentally responsible manner and in accordance with accepted principles and practices of radioactive waste management. The Director's decision, Normtek argued, approved and sanctioned the conducting of a designated activity in a manner which does not protect the environment or human health, is unsafe and impairs prospects for the use of the environment by further generations. And in so doing, Normtek argued, the Director's decision directly and adversely affects not only Normtek's commercial interests, but also its interest in a regulatory regime which provides level playing field for all industry participants, as well as providing

protection for the environment. The interest which Normtek claimed and which the Board did not deal with was that of an industry participant claiming that the way its industry had hitherto conducted its business was being directly affected. The Board did not deal with that issue.

[121] The Board stated that Normtek's concerns were based on a fear of increased competition. However, Normtek made it clear in it submission that it was not making use of the Environmental Appeal Board process to seek insulation from competition. Normtek stated clearly that it had no concern about landfilling low activity, short-lived radionuclides. To quote Normtek's response to the appeal-holder's submissions on its standing, "Normtek would not be at the table if Secure [had] applied for low concentrations of long-lived radioactive materials as recommended by the IAEA (International Atomic & Energy Association) and ICRP (International Commission on Radiological Protection)". Normtek's concern was with the landfilling of high activity, long-lived radionuclides which Normtek submitted are defined as those more than 10 times a certain so-called exemption of 0.3 Bq/g or 5 Bq/g. Normtek argued that the Director's decision approved the landfilling of material with a radioactivity level of up to 70 Bq/g.

[122] Normtek repeatedly argued that it does not compete with Secure Energy and that Secure Energy does not directly compete with it. Normtek claimed its core business was decontamination (of pipe and equipment) and Secure Energy's business at its Pembina landfill was the disposal of naturally-occurring radioactive material found in diffuse media. Normtek pointed out that it actually makes use of disposal services provided by landfill operators. Normtek pointed out that it sends its low activity level NORM to a landfill approved to accept NORM and it sends its high activity NORM for disposal in an underground geological formation. Normtek indicated it had clients in the vicinity of Secure Energy's Pembina landfill whose NORM they would seek to dispose of at Secure's facility. Secure Energy responded by dismissively saying it would not do business with Normtek. Regardless, Normtek expressly encouraged the Environmental Appeals Board to approve the landfilling of naturally occurring radioactive material at the Pembina landfill so long as the material it was approved to accept was at levels limited to 5 Bq/g. As previously indicated, Normtek's notice of appeal did not seek a denial of Secure Energy's application.

[123] The Board stated at paragraph 147 of its Decision that it was not within its jurisdiction to determine the saturation point of a particular industry. That is correct. The Board's jurisdiction is to hear appeals and make recommendations to the Minister. The Board was not being asked to determine the saturation point of the NORM industry. This case was not analogous to the *Byram Industrial* case where the appellant was opposed to the approval of another landfill for reasons of saturation. Normtek conceded that there was a place for both methods of disposal of NORM (landfill disposal and decontamination and geological disposal). Indeed, Normtek encouraged the Board to recommend approval of Secure's landfill, subject to conditions relating to the radioactivity of the material it accepted.

[124] But it would also be wrong to suggest, as the Board seemed to, that the landfill industry is any less regulated than the bottle recycling industry once was when market saturation may have been a relevant consideration for the Board to consider. The landfill industry is heavily regulated,

not by the Board, but by Alberta Environment, precisely because it is potentially so damaging to the environment and because it has the potential to adversely effect others, including those within the industry.

[125] The Board says it is not its jurisdiction to determine what disposal method industry should use. That determination was not being sought by Normtek. Normtek argued that both methods of disposal were needed and appropriate. In any event, the jurisdiction to prescribe disposal methods is not that of the Board. Ultimately, it is the jurisdiction of the Minister, with the assistance of his Director, to prescribe disposal methods and limits; but once they have been prescribed in an approval, it is the Board's responsibility, following a hearing where the issue is raised, to report to the Minister what it heard from those directly affected and to make recommendations to the Minister about the appropriateness of any disposal method and limits ordered by the Director or of the conditions under which such disposal might take place.

[126] The Environmental Appeal Board is not a regulator like some of the Province's energy boards. The Environmental Appeal Board is essentially an independent commission of inquiry reporting to the Minister. Vis-à-vis what are known as specified activity approvals, the Environmental Appeal Board has one function and one function only and that is to hear appeals by parties directly affected by Directors' decisions (s 90(2)). The Board reports to the Minister what it hears and makes non-binding recommendations (s 99(1)). Under the *Environmental Protection and Enhancement Act* the Minister, assisted by his Directors, is the regulator. The Board was established to provide the Minister with independent and expert advice with respect to such regulation by reporting to the Minister a summary of the representations which were made to it and any recommendations it might have as a result of those representations (s 99(1)).

[127] One of the goals of the *Environmental Protection and Enhancement Act*, when it was introduced by then Environment Minister Ralph Klein, was to achieve better environmental decision-making. The Environmental Appeals Board process was set up to help achieve that. By granting standing to those directly affected by Directors' decisions, the Minister receives the benefit of additional scrutiny which, in the case of directly affected industry participants, provides the Minister with a practical understanding of the effects of conditions of approvals, which industry participants are in a unique position to provide. The integration of environmental protection and economic impacts is one of the purposes of the *Environmental Protection and Enhancement Act* (ss 2(b) and 2(c)) and hearing appeals by those impacted economically helps the Minister achieve that purpose.

[128] In our view, the decisions of the Board and the reviewing judge that the economic effects of an approval are not enough to ground standing unless the economic effects can be linked back to the environment were unreasonable. The reviewing judge pointed out at paragraph 59 of her decision that the Act does not say that in order to be directly affected, a natural resource or the environment must be directly affected. We agree. Yet the reviewing judge also found that the Board's requirement that the potential for economic harm had to be connected to the environment

was reasonable. We disagree; but in any event, Normtek did present evidence which linked the economic impact on it back to the environment. That evidence was not dealt with by the Board.

Failing to Consider Relevant Evidence

[129] The Board dismissed much of Normtek's evidence as not being relevant to the issue of whether Normtek was directly affected by the Director's decision. The Supreme Court in *Vavilov* suggested that the failure to consider relevant evidence may be an indicator of unreasonableness. To quote the Board's decision at paragraph 10:

> In its written submissions, the Appellant identified a number of environmental concerns it has with the disposal of NORM waste in the Approval Holder's Landfill, Most of these environmental concerns relate to the potential merits of the appeal. The *Court* decision states the determination whether an appellant is directly affected is a preliminary matter and must be determined before hearing the substantive issues. The Board cannot hear submissions related to the substantive merits of an appeal and then, based on those submissions, determine whether an appellant has standing to bring the appeal. It is necessary for an appellant to provide evidence along with its arguments, but the evidence presented needs to demonstrate the effect of the decision being appealed on the person seeking standing.

[130] A further quote from the Board's Decision illustrates the Board's disregard for Normtek's evidence:

> Much of the Appellant's written submissions consisted of argument relating to the validity of the Director's decision. These arguments may be relevant in a hearing on the merits of the appeal; however, they are not relevant for the purposes of determining if the Appellant is directly affected. At this point in the Board's process, the Board is only determining a preliminary matter, namely whether the Appellant is directly affected by the decision to issue the Amending Approval.
>
> The Appellant provided argument on several issues that were more appropriate for consideration at a hearing on the merits of the appeal, including:
>
> 1. whether the Minister and Director contravened EPEA by not developing formal policies, procedures, and regulations concerning radioactive material or whether best practices were followed;
>
> 2. whether the Approval Holder misled or downplayed the long-term hazards of high activity radioactive waste;
>
> 3. the acceptable limits for waste to be accepted at the Landfill;

4. who the Director should have consulted to determine the potential impacts of his decision; and

5. the classification of the waste as low-level waste.

None of these matters relate to the issue of whether the Appellant is directly affected. [emphasis added]

The Board did not explain why these matters did not relate to the issue of Normtek's "directly affected" status. Clearly some of the evidence presented to the Board with respect to the foregoing matters was relevant to the issue of direct affect. Whether that evidence was sufficient to demonstrate that Normtek was potentially adversely affected by the Director's decision remains a matter for the Board to determine. But the Board's summary dismissal of this evidence and its failure to deal with the arguments based on it undermines the reasonableness of its conclusion that Normtek was not directly affected by the Director's decision.

[131] As the Supreme Court stated in *Vavilov*, reasonableness requires the decision-maker to consider the evidence which bears on its decision. The Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 stated that reasonableness requires an approach which is justified, transparent and intelligible. What the Board did was focus on what was a restrictive and unjustified definition of "directly affected" and in so doing failed to deal with the merits of the appellant's main argument. It was simply not reasonable to disregard relevant evidence on the basis of an unjustifiable restriction on the discretion conferred upon the tribunal by the legislature.

[132] Normally, the issue of standing is a preliminary matter to be determined at the outset. But that does not mean that a tribunal can ignore the merits of an appellant's appeal when those merits go to the issue of whether the appellant is directly affected. The Board treated these two issues as separate and distinct, never the twain to meet. Two silos, so to speak. That too was unreasonable. We would echo Justice McIntyre's comment in *Court*: "a review of the case law generated by the Board discloses that it would be unusual for an issue of standing not to be inextricably linked, more or less, to the substantive issues of an appeal" (para 68).

[133] The Board misinterpreted the law. The law is not, as the Board stated in paragraph 133, that the determination of whether an appellant is directly affected must be determined before hearing any of the substantive issues as if to say the determination of whether an appellant is directly affected must be determined without reference to the substantive issues. The law is simply that standing is a preliminary matter to be dealt with, if it can be, at the outset of the proceeding. Sometimes it cannot be.

[134] Determination of a preliminary *issue* just means that the issue has to be decided first, before the merits can be decided. It does not necessarily mean that a separate hearing and decision occur before any of the merits are heard. Rather, in the appropriate case, the Board may hear all the evidence, and as a matter of logical sequence, address the preliminary issue first. Again, how the

Board chooses to proceed will depend on the context of the case before it, but it should not place artificial, formalistic, constraints on its ability to address the issues before it in a reasonable manner.

[135] The issue of whether an appellant is directly affected by a proposed activity necessarily requires a consideration of the nature and merits of the appellant's objection (i.e. the substantive issues), especially if the basis of the appellant's objection is the "adverse effect" (defined as impairment of or danger to environment, human health, safety or property) of the Director's decision on it. Determining whether an appellant is directly affected may require the Board to consider whether the approval is sufficiently protective of the interests of the appellant which he or she alleges are being adversely affected (health, safety, property) or whether the conditions of the approval sufficiently mitigate what the Act defines as adverse effects such that the appellant may reasonably be found not likely to be directly affected. Such determination may also involve a consideration of what the Act refers to as "the environmental, social, economic and cultural consequences" of the proposed activity (s 40(c)) if those consequences directly affect the would-be appellant.

[136] If the ground for objecting to an approval or a Director's decision is that the approval or Director's decision adversely affects the appellant, then the merit of the objection is directly tied to whether or not the appellant is in fact adversely affected. Often that is the only issue which the Board has to determine. The directly affected issue and the substantive issues are often effectively the same. In such cases, the issue of whether the appellant is directly and adversely affected is really not finally determined until after the hearing of the appeal is completed and the Board has made its decision and reported to the Minister (ss 98 and 99). The Board may summarily dismiss an appeal by an appellant whose appeal is based on anticipated adverse effects of the Director's decision on it where the Board is of the view that the appellant is not directly affected; but such summary dismissal can only be made after there has been some consideration of the merits of the appellant's appeal. Here the Board expressly ruled that the appellant's submissions with respect to the merits of the Director's decision were "not relevant for the purpose of determining if the appellant is directly affected." To quote the Board further:

> The Board cannot hear submissions related to the substantive merits of an appeal and then, based on those submissions, determine whether an appellant has standing to bring the appeal.

[137] The appellant's submissions with respect to the merits of the Director's decision were all about the impacts of that decision on the appellant's business and the regulation of the appellant's industry. To summarily dismiss these impacts as speculative or too remote without dealing with them, at least in a preliminary way, makes assessing the reasonableness of the Board's decision to dismiss the appellant's appeal without a hearing impossible. In this case, the Board's actions precluded judicial review. The Board's reasons were not transparent enough to enable proper judicial review.

The Burden of Demonstrating that a Person is "Directly Affected"

[138] A word about onus. The Board cited its "Burden of Proof" rule (Rule 29) and found that Normtek had not discharged its onus to prove that it is or will be directly affected by the Director's decision. The onus on the would-be appellant to show that he or she is directly affected is an adversarial principle imported from our legal system. It is not to be ignored, but it may not always be entirely appropriate for poly-centric environmental decision-making under an Act which has purposes as many and varied purposes as those which the legislature has declared in section 2 of the *Environmental Protection and Enhancement Act*.

[139] Also, the Board's determination of whether a person is directly affected should also be tempered by the knowledge that there is not much time for a party claiming to be directly affected by a Director's decision to review that decision or approval once it has been made. A notice of appeal must be submitted to the Board no later than 30 days after receipt of notice of the decision sought to be appealed (s 91(4)(c)). If it becomes apparent later that an appellant whose notice of appeal was dismissed without a hearing is directly and adversely affected, there are few remedies. The Director may on his own initiative, amend a term or condition of an approval if he is of the opinion that an adverse effect that was not reasonably foreseeable is occurring or may occur (s.70(3)(a)(i)). The Director may also cancel an approval; but as between the approval-holder and persons claiming to be adversely affected, only the approval-holder may apply to amend or cancel an existing approval (s 70(1)). That legislative scheme may call for some caution in summarily dismissing an appeal where there is a possibility that the person appealing may be directly and adversely affected. The opportunities to mitigate direct adverse effects once the designated activity has been approved and undertaken may be limited. As the Board pointed out in its decision, when an appeal is dismissed because the Board is of the opinion that the appellant is not directly affected by the Director's decision, the Director's decision is then final. It does not go to the Minister for his consideration. The Minister is deprived of the appellant's input and the Board's recommendation.

[140] As indicated above, the Board pointed to Rule 29 of its *Rules of Practice*, suggesting that it is clear that the onus is on the appellant to prove that it is directly affected. Strictly speaking, that is not correct. What the Rule states is this:

> In cases which the Board accepts evidence, any Party offering such evidence shall have the burden of introducing appropriate evidence to support its position. Where there is conflicting evidence, the Board will decide which evidence to accept and will generally act on the preponderance of the evidence.

The only onus this Rule imposes is to adduce evidence in support of one's position. The appellant did that. The approval-holder and the Director submitted little, if any evidence which conflicted with the evidence of Normtek. Indeed, both the Director and the approval holder expressly declined to engage the appellant on the merits of its objection. By way of example, Normtek argued that the Director's decision approving the landfilling of certain high level naturally occurring

radioactive wastes would adversely affect its business of decontaminating equipment of those wastes and disposing of them in subterranean geological formations. In support of this submission, Normtek supplied the Board with the relative costs of the two disposal methods. That evidence was not contradicted by any evidence adduced by the approval-holder or the Director.

[141] As indicated above, the merits of Normtek's objection were relevant to its directly affected status. The approval holder and the Director expressly declined to get into the merits and so there was very little, if any, "conflicting evidence" which would engage the second part of the Rule. Furthermore, the onus on the appellant, when its standing is challenged, is not to prove conclusively that it is directly affected. As the Board stated in *Mizera v Director*[8] at paragraphs 24 and 26, relying on this Court's decision in *Leduc (County No 25)*, the onus is on the appellant to establish a reasonable possibility that it will be directly affected by the Director's decision.

Discretion to Hear an Appeal by a Person Not Directly Affected

[142] We reject the appellant's argument that the Board fettered what was argued to be a discretion conferred upon it by section 95(5) of the *Environmental Protection and Enhancement Act* to hear an appeal of an approval by a person who is not directly affected by that approval based on a general public interest standing. We agree with the reviewing justice that the Act does not confer a discretionary authority on the Board to entertain an appeal by a person who is not directly affected.

[143] Section 91(1) makes it clear that only a person who is directly affected by an approval may appeal it to the Environmental Appeals Board.

[144] The rule against fettering discretion which requires a statutory tribunal with discretionary authority to actually exercise that discretion was not engaged in this case because what discretion there was to be exercised was exercised.

[145] The appellant argues that because subsection 95(5)(a) states that the Board "may dismiss" an appeal if it is of the opinion that the person submitting the appeal is not directly affected, there is a discretion to hear an appeal when the Board is of the opinion that the appellant is not directly affected.

[146] That argument, if sustained, would lead to an untenable situation in which the Board, already of the opinion that the appellant is not directly affected, would hear the appeal anyway. This would undermine the whole point of the limiting language of "directly affected". The appellant's statutory interpretation is particularly problematic when the basis for the appeal of the

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[8] *Mizera et al v Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection, re: Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal No. 98-231-98-234-D, online: Alberta Environmental Appeal Board < http://www.eab.gov.ab.ca/dec/98-231-234.htm>.

Director's decision, as it was in this case, was the alleged direct effects of the decision on the party proposing to appeal.

[147] Section 91(1) stipulates who may submit an appeal to the Environmental Appeals Board when a Director issues an approval. Only the approval holder and a person who previously submitted a statement of concern and who is directly affected by the Director's decision may submit an appeal.

[148] Section 95(5)(a)(ii), in providing that if the Board is of the opinion that the person submitting an appeal is not directly affected by the Director's decision it "may" dismiss the appeal, simply reinforces the earlier statutory requirement that an appeal may only be submitted by a person directly affected. It makes it clear that the Board is empowered to dismiss appeals by a person whom the Board deems not to be directly affected.

[149] There is no curious ambiguity in the use of the word "may", as suggested. The explanation for the word "may" in section 95(5)(a) is simply that section 95(5)(a) provides a number of circumstances in which the Board is empowered to dismiss an appeal. Read as a whole, section 95(5)(a) is simply a permissive provision enabling the Board to dismiss appeals it ought not to have to hear or appeals by persons who have not been conferred with a right of appeal.

[150] The Board has no control over who might submit a notice of appeal. Section 95(5) simply makes it clear that the submission of an appeal does not confer an absolute right of appeal on the person submitting the notice of appeal. And so, upon receipt of a notice of appeal, if the Board is of the opinion, for example, that the appeal is frivolous, vexatious or without merit, it "may dismiss" it (s 95(5)(a)(i)). Conferring a discretion to dismiss a frivolous or vexatious appeal or an appeal without merit does not mean that the Board has the discretion to hear an appeal it considers to be frivolous or vexatious or without merit. That would be illogical. Likewise, the Board is conferred with the discretion to dismiss an appeal if the person submitting the appeal is not directly affected by the Director's decision. But that does not mean that the Board has a discretion to hear an appeal by a person who is not directly affected, especially not where the basis for the appeal of the decision is the direct effect of the approval on the person submitting the appeal. If the Board were to hear an appeal in those circumstances, it would not be doing so without an open mind, having already formed the opinion that the appellant was not directly affected.

[151] The appellant argues that the use of the words "may dismiss" in section 95(5)(a) when contrasted with the words "shall dismiss" in section 95(5)(b) indicates a legislative intention to confer a discretion on the Board to hear appeals it is empowered to dismiss (namely a discretion to hear an appeal even though the Board is of the opinion that the appellant is not directly affected). That argument ignores the reason for the use of the words "shall dismiss" in s 95(5)(b). The reason the Board must dismiss the appeals referred to in s 95(5)(b) is that the person submitting the appeal has already had his concerns heard and considered by another quasi-judicial administrative tribunal statutorily charged with considering the concerns of those directly affected by the activity which the subject of the Director's approval (or has had the opportunity to have his or her concerns heard

and considered). Section 95(5)(b) does not demonstrate a legislative intent to confer a discretion in s 95(5)(a). Section 95(5)(b) is of no assistance in interpreting section 95(5)(a).

[152] We agree with the decision of the reviewing judge and with the decision of Hall, J. in *Alberta Wilderness Association v Alberta (Environmental Appeal Board)* upon which she relied: Section 95(5)(a) does not give the Board jurisdiction to hear public interest appeals by persons not directly affected. There are those who argue that the legislature's use of the phrase "directly affected" confers a very wide discretion and may indicate a legislative intent to confer jurisdiction to grant public interest standing. But even those who make that argument concede that the public interest standing must be grounded in a more or less direct interest (*Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45). It is also true that an activity the Director approves may directly affect a large segment of the public which potentially might make the class of persons directly affected very large; but that is not the same as granting standing to a person who has been found not to be directly affected. The Act clearly does not confer jurisdiction on the Board to grant public interest standing to a party who the Board finds is not directly affected. Nor does current jurisprudence confer such jurisdiction on administrative tribunals in the absence of clear statutory authority.

[153] While courts may have inherent jurisdiction to accord a form of public interest standing to those seeking judicial review of the administrative tribunal decision in order to permit challenges of unconstitutional laws, they do not ordinarily accord such status to those who are not directly affected. But, regardless, tribunals do not possess the inherent jurisdiction which courts possess. If that represents a disconnect, and we are not certain that it does, then that is the current state of our law. Section 95(6) of the Act does, however, confer a discretion on the Board to give opportunities to persons it considers should be allowed to make representations to make representations at an appeal hearing; but that discretion can only be exercised once an appeal is properly before the Board and then only in accordance with the principles of natural justice. In short, we reject the argument that section 95(5)(a)(ii) of the Act confers a discretionary authority to entertain appeals from individuals who the Board finds are not directly affected by the Director's decision sought to be appealed.

Court's Disposition

[154] Having found that the Board's interpretation of "directly affected" in sections 91 and 95 of *Environmental Protection and Enhancement Act* is too restrictive, we would remit the matter of Normtek's directly affected status to be decided by the Board. The Board remains seized with the issue of Normtek's standing. The Board must determine whether it is of the opinion that Normtek is directly affected by the decision of the Director. We express no view on that issue. It is the Board's opinion which is determinative; but it must not decide the issue employing the restrictive interpretation of "directly affected" which it employed in this case. It must decide the issue having regard to the provisions of the Act and the evidence relevant to the determination to be made.

[155] Going forward, it is also the Board which must determine how to interpret the phrase "directly affected" in any given case. But, again, it must do so in accordance with its governing legislation.

[156] The appeal from the judicial review judge's decision is accordingly allowed on the issue of the Environmental Appeals Board's interpretation of "directly affected" in section 91(1()(a)(i) of the *Environmental Protection and Enhancement Act*. The appeal from the judicial review judge's decision on the jurisdiction of the Board to entertain appeals from persons not directly affected is dismissed.

Appeal heard on February 11, 2020

Memorandum filed at Calgary, Alberta
this 11th day of December, 2020

O'Ferrall J.A.

Strekaf J.A.

Authorized to sign for: Khullar J.A.

Appearances:

S.C. Fluker
for the Appellant

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