February 15, 2013

No Public Interest Standing at the Alberta Environmental Appeals Board

Written by: Shaun Fluker

Decisions Considered:

Alberta Wilderness Association v Alberta (Environmental Appeal Board), 2013 ABQB 44;

Water Matters Society of Alberta et al. v *Director, Southern Region, Operations Division, Alberta Environment and Water*, re: *Western Irrigation District and Bow River Irrigation District* (10 April 2012), Appeal Nos. 10-053-055 and 11-009-014-D (A.E.A.B.), (the "EAB Standing Decision").

Over the past decade, Alberta Environment has amended water licenses held by irrigation districts (IDs) to allow these IDs to allocate water for commercial purposes other than irrigation. Some question the authority of Alberta Environment to approve these amendments under the Alberta *Water Act*, RSA 2000, c W-3. The general argument here is that such change-of-purpose license amendments should be handled as a transfer of license allocation under the *Water Act*. And this argument is grounded on several points, including that by using the license amendment route rather than a transfer the conservation holdback provision of the *Water Act* is avoided and the amendment approach involves significantly less opportunity for public oversight over water management. This latter point has borne out further as public interest groups have been consistently denied standing to contest these approvals by Alberta Environment and the Alberta Environmental Appeals Board (EAB). The summary point is that Alberta Environment and the EAB assert public interest groups do not qualify as "directly affected" by a license amendment, and thus have no standing to file a statement of concern with Alberta Environment and/or a notice of appeal with the Board under the *Water Act* to challenge the legality of these amendments.

In May 2011 Alberta Environment granted a change-of-purpose license amendment to both the Western Irrigation District and Bow River Irrigation District to expand allowable uses. As with the earlier ID license amendment processes, Alberta Environment and the EAB denied public interest groups standing to challenge the legality of the process under the *Water Act*. What set this standing dispute apart from the earlier ones is that here, in addition to arguing they were directly affected by the Alberta Environment license amendment decision, the Alberta Wilderness Association, Water Matters, and Trout Unlimited argued the EAB should grant them public interest standing to challenge the legality of the license amendment under the *Water Act*. The EAB denied having the authority to grant public interest standing in the EAB Standing Decision. The groups sought judicial review on this point, and in a recent decision Justice Hall upheld the EAB's ruling that it does not have authority to grant public interest standing. The issue decided by Justice Hall in this case is: "Does the EAB have jurisdiction to hear an appeal

from Applicants who were not directly affected by the decision of the Director (Alberta Environment), on the basis that the Applicants are to be granted public interest standing?" The answer is no.

The environmental law clinic at the Faculty has been working with Ecojustice on this issue for a while now – see my overview of clinic work from last year on ABlawg here. During this past semester, we had 3 JD students contribute to the applicant's memorandum of argument filed with the Court for the judicial review in front of Justice Hall. Each student was responsible for developing legal arguments for one of the three issues: (1) what standard of review should the Court apply; (2) what jurisdiction does the EAB have to grant public interest standing; (3) would the groups here qualify for public interest standing if the EAB had jurisdiction to grant it. As it turns out, only the first two issues were ultimately considered by Justice Hall, and so I won't comment on (3).

Standard of Review – true questions of jurisdiction do exist

Our research in the clinic led us to the view that the question on whether the EAB has authority to grant public interest standing was a true question of jurisdiction and thus subject to review on the correctness standard. The applicable law here is essentially that a true question of jurisdiction is to be found only in limited cases where the administrative decision-maker in question must determine whether its governing statutory scheme provides it with the authority to embark on a particular inquiry (Alberta (*Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 33). In the alternative, we felt the question of whether a statutory tribunal can grant public interest standing would be a question of central importance to the legal system as a whole and outside the specialized expertise of the EAB and thus subject to the correctness standard.

Alberta Environment argued the standard of review applied by the Court here should be reasonableness – in other words, that the Court should defer to the EAB on this question. In support, Alberta Environment cited the usual suite of decisions wherein Alberta courts have deferred to the EAB on standing cases (e.g. *Court v Alberta (Director, Bow Region, Regional Services, Alberta Environment*), 2003 ABQB 456 and more recently *Westridge Utilities v Alberta (Director of Environment, Southern Region)*, 2012 ABQB 681). Alberta Environment also noted the presence of a strong privative clause in the EAB's governing legislation – section 102 of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (*EPEA*).

Justice Hall agrees that the question here is a question of whether the EAB can grant public interest standing to a party who does not meet the "directly affected" test for standing under the *Water Act* is a true question of jurisdiction and that the applicable standard of review is correctness (at para 12).

What jurisdiction does the EAB have to grant public interest standing – none

The normal case for standing to challenge Alberta Environment license decision under the *Water Act* begins with a person who files a statement of concern under section 109 who demonstrates they may be directly affected by a pending license decision. Alberta Environment applies this section such that a person's statement of concern must be "accepted" before it is considered. That acceptance by and large involves an assessment of whether the person can demonstrate they may be directly affected by the pending license decision. Assuming Alberta Environment issues a decision that is adverse, the person may then file a notice of appeal to the EAB under section

115 of the *Water Act*. The directly affected test also applies at this stage as section 115 states a person who is directly affected by the license decision may file the notice of appeal to the EAB. Readers interested in how "directly affected" has been interpreted by the EAB and the Alberta courts should consult my colleague Nigel Bankes' 2006 article entitled "Shining a light on the management of water resources: the role of an environmental appeal board" (2006), 16 Journal of Environmental Law and Practice 131 at 160-171. The short of it is this test is highly factual and requires an applicant to demonstrate a measure of proximity and causal connection to the issue at hand. Public interest groups generally need not apply.

So the interest legal twist in this case was the applicant public interest groups sought to appeal the Alberta Environment license decision to the EAB not as a "directly affected" person but rather under the doctrine of public interest standing. This is novel ground because to our knowledge the authority of a statutory decision-maker like the EAB to grant public interest standing has not been considered by a superior court in Canada. Those readers familiar with public interest standing will recall that the doctrine has been developed and applied by the Canadian judiciary as a means for a person who is not otherwise directly affected to appear before *a superior court* – not an administrative tribunal. The most recent articulation of the public interest standing doctrine coming from the Supreme Court of Canada is found in *Canada (Attorney General) v Downtown Eastside Sex Workers Against Violence Society*, 2012 SCC 45 – see the ABlawg comment written by Theresa Yurkewich and Christina Lam here.

The argument that the EAB has legal authority to grant public interest standing to the applicants was based on essentially three grounds: (1) an interpretation of sections 95 and 96 of *EPEA*; (2) the principle of legality that no exercise of public authority is completely immune from legal scrutiny; (3) the need to preserve scarce judicial resources. In his reasons for decision, Justice Hall only mentions ground (1) and dismisses it in short order holding that the statutory provisions that govern this case are found in the *Water Act* not *EPEA* (at para 27).

The primary statutory argument by the applicants was that section 95(5) in *EPEA* sets out two categories of scenarios for how the EAB should deal with a filed notice of appeal. Section 95(5)(a) provides a list of scenarios in which the EAB *may* dismiss a notice of appeal whereas section 95(5)(b) sets out scenarios where the EAB *shall* dismiss a notice of appeal. Notably the scenario in this case was one listed in clause (a) as being where the notice of appeal is submitted by a person the EAB does not believe is directly affected by the license decision under section 115 the *Water Act*. The argument by the applicants was that the legislature's use of the word "may" in clause (a) as compared to the use of the word "shall" in clause (b) indicates an intention by the legislature that the EAB has the discretion to forego dismissing an appeal commenced under section 115 of the *Water Act* even though the person submitting the notice of appeal is not directly affected. If the legislature had intended that the EAB not have this discretion, it would have listed such a scenario under clause (b). The applicant's noted the EAB itself has made such distinction in an earlier case (See *Re Bildson* (19 October 1998) Appeal No. 98-230-D)).

Justice Hall dismisses this argument by holding that section 95 of EPEA does not govern the EAB in this case, but rather it is the *Water Act* that governs the EAB's jurisdiction to hear this appeal because it concerns a decision by Alberta Environment to amend a *Water Act* license (at para 27). Earlier in his reasons, Justice Hall also states the EAB jurisdiction to sit an appeal concerning matters arising from the *Water Act* comes from that statute not *EPEA*. I find this troubling, if simply because the EAB is constituted by *EPEA*. Section 95 is found within the part of *EPEA* that establishes the EAB and heading above section 95 states "powers and duties of

Board." Even Alberta Environment in its written argument sets out section 95 of *EPEA* as setting out the general powers and authorities of the Board.

There is no doubt this issue is a thorny one. And it is not entirely certain that section 95 of *EPEA* grants the EAB the authority to grant public interest standing. And it is beyond question that the EAB does not enjoy inherent jurisdiction and can only have those powers granted to it by its enabling legislation. But when it comes to assessing what powers and duties are held by the EAB, I would not have thought that provisions of the *Water Act* should govern or that Part 4 of *EPEA* that establishes and constitutes the EAB would not deserve some detailed interpretation on a question such as this.

Justice Hall decides the case on this statutory interpretation issue, and so he does not consider the other 2 grounds raised by the applicants. For me, this is the most disappointing aspect of his decision. This case presented a real opportunity to be at the cutting edge of the law, and in choosing not to even address the principle of legality ground Justice Hall's decision becomes very uninspiring.

The rule of law dictates that all exercises of public authority must find their source in law. The Supreme Court of Canada and the Alberta Court of Appeal have recently confirmed the nexus between public interest standing with the principle of legality. See for example *Canada (Attorney General) v Downtown Eastside Sex Workers Against Violence Society*, 2012 SCC 45 at para 31. And closer to home in the words of Chief Justice Fraser:

> If the legality principle is to be meaningful, there must be a way to hold government itself accountable where government actions do not comply with legality, including the rule of law. The route Canada has taken is to grant public interest standing to citizens or groups, in appropriate cases, to challenge government action on the basis it does not comply with the legality principle. *(Reece v Edmonton (City)*, 2011 ABCA 238 at para 171).

The argument here is that link between public interest standing and the rule of law is just as applicable to the EAB as it is to a superior court. This is because the EAB is an appellant body distinct from line decision-makers. But for the creation of the EAB and its appellant powers under *EPEA*, a question concerning the legality of a water license amendment issued by Alberta Environment could be brought directly to a superior court by judicial review and that court would have the power to grant public interest standing to the applicants.

The result of Justice Hall's decision is that because the legislature saw fit to create the EAB to hear environmental appeals flowing from designated statutory regimes including the *Water Act*, public interest standing is not available to challenge the legality of a water license amendment. And moreover, Alberta Environment can insulate itself from legal scrutiny in water allocation decisions by dismissing all statements of concern submitted under the *Water Act* in relation to a pending license decision. Surely it was not the intention of the legislature that the creation of the EAB would be such a roadblock to asserting the rule of law to hold Alberta Environment accountable. Yet, that is the very message and result of this case.