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Leave to Appeal Granted in NRCB Case Concerning Participatory Rights and the Interpretation of ‘Directly Affected’ Persons Entitled to a Hearing

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Decision commented on: *JH Drilling Inc. v Alberta (Natural Resources Conservation Board)*, [2014 ABCA 134](#)

The Alberta Court of Appeal has granted leave to JH Drilling to appeal a ‘standing’ decision by the Natural Resources Conservation Board (NRCB). While not a decision on the merits of the issue, this leave decision is significant because the question for appeal will concern the NRCB’s interpretation of ‘directly affected’ in its governing legislation to determine participatory rights before the Board. Moreover, the interest asserted by JH Drilling to be directly affected here is one of a commercial nature – JH Drilling is not a landowner or resident in the immediate vicinity of the proposed project in this case. To my knowledge, this merit hearing will be the first time the Court of Appeal considers participatory rights before the NRCB.

The NRCB was created in 1991 at a time when Alberta overhauled its regulatory framework governing environmental management. The Board’s original mandate was to review non-energy resource projects and assess whether the development of such projects is in the public interest. The Board still holds this mandate, but today also regulates some aspects of feedlot operations.

Resource projects within the public interest jurisdiction of the NRCB are prescribed by section 4 of the *Natural Resources Conservation Board Act*, [RSA 2000 c N-3](#) (*NRCB Act*). Reviewable projects include pulp and paper, water storage, quarry, and recreational projects. The project in question here is a limestone quarry proposed by Parsons Creek Aggregates to be located on crown lands in the Fort McMurray region.

No person may commence a reviewable project without the approval of the NRCB (*NRCB Act*, s 5(1)), so project proponents apply to the Board for approval. Prior to submitting the application for approval of its quarry project, Parsons Creek completed an environmental impact assessment under the *Environmental Protection and Enhancement Act*, [RSA 2000 c E-12](#). The only real opportunity for interested persons to comment on the impact of the Parsons Creek quarry is in a project review hearing conducted by the NRCB.

Section 8(2) of the *NRCB Act* obligates the NRCB to give persons who may be directly affected by a proposed project the usual suite of hearing entitlements: an opportunity to review the application; an opportunity to furnish evidence relevant to the application, cross-examine the applicant and other parties before the Board, and make arguments to the Board on the merits of

the application. Some readers will note these are the same entitlements that were set out by section 26(2) of the now-repealed *Energy Resources Conservation Act*, RSA 2000 c E-10 concerning participatory rights before the Energy Resources Conservation Board (ERCB) – now superseded by the Alberta Energy Regulator (AER).

The record disclosed on the NRCB website (see [here](#)) suggests JH Drilling objects to the proposed quarry because the Parsons Creek mining operations will prejudice JH Drilling's pending request with Alberta Environment and Sustainable Resource Development (AESRD) to recover sand and gravel from the same area. There is undoubtedly an issue of overlapping resource exploitation in this case, reminiscent of the 'gas over bitumen' and 'coal versus methane gas' disputes in recent times. In an August 2013 decision the NRCB ruled that JH Drilling's objections were outside its jurisdiction as they relate to AESRD approvals on the sand/gravel extraction and otherwise amount to a “. . . commercial dispute between potentially competing entities in the aggregate supply business.” Accordingly, the NRCB held JH Drilling failed to establish itself as a person who may be directly affected by the Parsons Creek project and denied JH Drilling participatory rights to object to the application. (See [here](#) at 4, 5). Since no other persons filed objections with the NRCB, the Board proceeded to consider the quarry application without a public hearing, and ultimately approved the application this past February.

The specific question of law in this case will be whether the commercial or economic interest of JH Drilling arising from its application to AESRD for a surface lease to recover sand/gravel is sufficient to satisfy the 'directly affected' test for participatory rights at the NRCB. This test is also set out in provisions governing participatory rights before AESRD and the Alberta Environmental Appeals Board under the *Environmental Protection and Enhancement Act*. The Environmental Appeals Board (EAB) has provided its interpretation of 'directly affected' in numerous decisions, and generally speaking requires a person to give evidence on how a project will harm them personally or their use of land impacted by the project (For commentary on this see Nigel Bankes, "Shining a Light on the Management of Water Resources: The Role of an Environmental Appeal Board" (2006) 16 J of Env'tl L & Prac 131). The Court of Queen's Bench has endorsed this interpretation in *Court v Alberta (Director, Bow Region Regional Services, Alberta Environment)* (2003), 1 CELR (3d) 134). It will be interesting to see if and/or how the Court of Appeal in this case draws upon this earlier jurisprudence concerning the EAB. But hopefully the Court of Appeal looks beyond the specifics of this case.

Perhaps the Court of Appeal will build upon its observation in *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19 that hearings are an integral component of resource development in Alberta and seize this opportunity to consider participatory rights in the context of the public interest character of these decisions and the overall socio-political context of resource development in Alberta today. Judicial consideration on this point so far consists largely of rather uninspiring exercises in the literal interpretation of statutory text and judicial deference to administrative decisions and policy: See *Friends of the Athabasca Environmental Assn v Alberta (Public Health Advisory and Appeal Board)*, [1996] AJ No 47 (QL), 1996 ABCA 6 (CanLII); *Kostuch v Alberta (Environmental Appeal Board)*, [1996] AJ No 311 (QL), 1996 CanLII 10565 (AB QB); *Court v Alberta (Director, Bow Region Regional Services, Alberta Environment)*, 2003 ABQB 456; *Dene Tha First Nation v Alberta (Energy & Utilities Board)*, 2005 ABCA 68; *Kelly v Alberta (Energy Resources Conservation Board)*, 2009 ABCA 349; and *Kelly v Alberta (Energy Resources Conservation Board)*, 2011 ABCA 325. Meanwhile resource project decision-makers in Alberta – including the NRCB, AER, EAB and AESRD – have

increasingly interpreted the ‘directly affected’ provisions in their governing legislation to restrict the scope of persons having the right to participate in decision-making to a very narrow class of individuals – basically landowners or other residents in close vicinity to a project.

We are now at the point where public concerns on a resource project must either be argued by a nearby individual who is personally affected by the project, or perhaps by others but only where the ‘directly affected’ individual triggers a public hearing. The opportunity for public interest groups, in particular, to participate in resource project reviews has been severely compromised by the narrow interpretation given to ‘directly affected’ by statutory agencies. It is difficult to comprehend how these agencies ensure resource development decisions are in the public interest when they seem so reluctant to hear public input and expressly refuse to do so in some cases. In my view, it is time for the Court of Appeal to make some sense of this and substantively weigh in on who can be ‘directly affected’ by a resource development project.

I examine the issue of public participation in resource project decision-making more fully in “The Right to Public Participation in Resources and Environmental Decision-Making in Alberta” forthcoming this Fall in volume 52(2) of the Alberta Law Review.

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