

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – October 12, 2004

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed by Ben Gadd with respect to Approval No. 00188589-00-00 issued under the *Water Act* and Amending Approval Nos. 11767-01-02 and 46972-00-01 issued under the *Environmental Protection and Enhancement Act* to Cardinal River Coals Ltd. by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: Intervenor Decision: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (12 October 2004), Appeal Nos. 03-150, 03-151, and 03-152-ID2 (A.E.A.B.).

BEFORE:

Dr. Frederick C. Fisher, Q.C., Panel Chair.

SUBMISSIONS:

Appellant: Mr. Ben Gadd, represented by Ms. Jennifer Klimek.

Director: Mr. Larry Williams, Director, Central Region, Regional Services, Alberta Environment, represented by Mr. William McDonald and Mr. Darrin Stepaniuk, Alberta Justice.

Approval Holder: Cardinal River Coals Ltd., represented By Mr. Dennis R. Thomas, Q.C. and Mr. Martin Ignasiak, Fraser Milner Casgrain LLP.

Intervenors: Mr. Allan Dane, Ms. Barb Higgins, Ms. Helen Ready, Ms. Janice Melnychuk, Mr. Ed Vass, Ms. Joyce Wilkins, and Mr. Roger Wilkins, represented by Ms. Karin Buss, Ackroyd, Piasta, Roth & Day LLP; Trout Unlimited, represented by Mr. Brian Meagher; Yellowhead County, represented by Mr. Andrew Stanton; Alberta Fish & Game Association, represented by Mr. Quentin Bochar; United Mine Workers of America, represented by Mr. Robin Campbell; Mr. Tom Stang; Town of Hinton, represented by Mayor Alex Galbraith; West Yellowhead Community Futures Development Corporation, represented by Mr. Jack Lawrence; and Alberta Council for Sustainable Communities and the Environment, represented by Mr. Robin Campbell.

EXECUTIVE SUMMARY

Alberta Environment issued Approval No. 00188589-00-00 under the *Water Act and Amending Approval Nos. 11767-01-02 and 46972-00-01* under the *Environmental Protection and Enhancement Act* to Cardinal River Coal for the construction, operation, and reclamation of a private haul road located near Cadomin, Alberta.

The Board received Notices of Appeal from Mr. Ben Gadd appealing the Approval and the Amending Approvals.

The Board determined that Mr. Gadd was directly affected by the private haul road and, therefore, was granted standing.

In response to the Board's notice of the hearing scheduled for September 27 and 28, 2004, the Board received nine intervenor requests, representing 15 individuals and organizations.

The Board granted full party status to Mr. Allan Dane, Ms. Barb Higgins, Ms. Helen Ready, Ms. Janice Melnychuk, Mr. Ed Vass, Ms. Joyce Wilkins, and Mr. Roger Wilkins, who are all residents of Cadomin, Alberta. The Board is of the view that residents of Cadomin will assist the Board in making its report and recommendations in this matter. Trout Unlimited, Yellowhead County, Alberta Fish and Game Association, United Mine Workers of America, the Town of Hinton, West Yellowhead Community Futures Development Corporation, and the Alberta Council for Sustainable Communities and the Environment were granted the right to participate through written submissions and a five minute oral presentation at the hearing. The Board is of the view that these intervenors may have information that will assist the Board in making its report and recommendations in this matter. The intervenor request of Mr. Tom Stang was dismissed, as he does not live in the area.

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I. BACKGROUND

[1] On December 9, 2003, the Director, Central Region, Regional Services, Alberta Environment (the “Director”), issued Approval No. 00188589-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to Cardinal River Coals Ltd. (the “Approval Holder”) for the construction, operation, and reclamation of a private haul road (the “Haul Road”) located near Cadomin, Alberta.

[2] On December 19, 2003, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Mr. Ben Gadd (the “Appellant”) appealing the Approval. On December 29, 2003, the Board wrote to the Appellant, the Approval Holder, and the Director (collectively the “Parties”) acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and the Director of the appeal.

[3] On December 5, 2003, the Director issued Amending Approval Nos. 11767-01-02 and 46972-00-01 (the “Amending Approvals”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, E-12 (“EPEA”) to the Approval Holder for the opening up, construction, operation, and reclamation of the Haul Road. The Amending Approvals¹ allow for the development of the Haul Road between the Luscar coal mine and the Cheviot coal mine, to transport coal from the Cheviot coal mine to the processing plant located at the Luscar coal mine site.

[4] On January 5, 2004, the Board received Notices of Appeal from the Appellant appealing the Amending Approvals. On the same date, the Board acknowledged receipt of the Notices of Appeal and notified the Approval Holder and the Director of the appeals.

[8] On January 5, 2004, the Board received a letter from the Director suggesting the appeals of the Approval and the Amending Approvals be combined. On January 6, 2004, the Board received a letter from the Approval Holder also asking that the appeals be dealt with by the Board simultaneously. The Approval Holder also requested that instead of scheduling a

¹ As the Approval and Amending Approvals were issued with respect to the same haulroad, the Board will refer to the Approval and Amending Approvals collectively as the “Approvals.”

hearing or mediation meeting, a preliminary meeting should be scheduled first so that the following issues may be addressed:

- “(a) whether Mr. Gadd is ‘directly affected’ by the Approvals under appeal;
- (b) whether Mr. Gadd had the opportunity to participate in a hearing or review administered by the Energy Resources Conservation Board at which all of the pertinent matters were adequately dealt with;
- (c) whether the Government of Alberta participated in a public review under the *Canadian Environmental Assessment Act* at which all of the pertinent matters were adequately dealt with; and
- (d) which matters raised by Mr. Gadd in the Notices of Appeal ought to be addressed during the EAB’s [(the “Board’s”)] hearing of the appeal, if an appeal proceeds.”

The Board granted these requests.

[5] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the “NRCB”) and the Alberta Energy and Utilities Board (the “AEUB”) asking whether this matter had been the subject of a hearing or review under their respective legislation. On January 13, 2004, the NRCB responded in the negative. On January 20, 2004, the Board received a letter from the AEUB advising that:

“...Cardinal River Coals Ltd. (CRC) applied to the Alberta Energy and Utilities Board (Board/[A]EUB) in August 2002, under the *Coal Conservation Act* for approval to develop a private haul road from the Cheviot Mine Site to the Coal Processing Plant located at the Luscar Mine Site. CRC applied to amend Permit 2000-37 to extend the Cheviot mine permit area so as to include the private haul road. Permit No. C2000-37 was issued to CRC with respect to the Cheviot mine following two joint [A]EUB/Canadian Environmental Assessment Agency (CEAA) [(the “Joint Review Panel”)] hearings in 1997 and 2000. The CRC also applied for an amendment of Permit No. C2000-2 with respect to those portions of the private haul road that would be located within the Luscar Mine site. Permit No. C2000-2 was issued to CRC for the operating of the Luscar Mine.

A number of objections were received to CRC’s application to develop a haulroad, including an objection from Mr. Ben Gadd. Following a review of submissions, the Board [(AEUB)] dismissed all the objections on the basis that the objectors did not have standing, pursuant to s. 26 of the *Energy Resources Conservation Act*. As a result, no hearing was held and the Board [(AEUB)] issued Permit No. C2003-4 on April 9, 2003. Permit No.C2003-4 rescinded Permit No. C2000-37 in order for the inclusion of a private haul road to the existing coal processing plant located at the Luscar Mine Site.”

The AEUB provided a copy of permit No. C2003-4 and AEUB Decisions 97-088 and 2002-59, which were the two decisions of the Joint Review Panel with regard to the Cheviot project.

[6] On January 22, 2004, the Board informed the Parties that it had decided to schedule a Preliminary Meeting to deal with the preliminary motions raised in the Approval Holder's January 6, 2004 letter. The Preliminary Meeting was held on April 26, 2004.

[7] The Board notified the Parties on May 26, 2004, that it had decided to grant the Appellant standing in these appeals and that to the extent that the "...changes in the design of the haul road were not considered by the Alberta Energy and Utilities Board hearings, the Board retains jurisdiction to hear the matter." The Board stated, however, that the issues that would be considered would be "...narrowly defined and will focus on the difference in the environmental impacts that were originally before the AEUB and what now exists...."²

[8] On August 9, 2004, the Board sent the Parties the schedule for providing submissions in preparation of the Hearing set for September 27 and 28, 2004.

[9] In response to the Board's notice of the Hearing, published in the Jasper Booster and the Hinton Parklander, the Board received intervenor requests from Mr. Allan Dane, Ms. Barb Higgins, Ms. Helen Ready, Ms. Janice Melnychuk, Mr. Ed Vass, Ms. Joyce Wilkins, and Mr. Roger Wilkins (collectively, the "Cadomin Residents"); Trout Unlimited; Yellowhead County; the Alberta Fish and Game Association; the United Mine Workers of America; Mr. Tom Stang; the Town of Hinton; the West Yellowhead Community Futures Development

² On June 14, 2004, the Board received submissions from the Parties regarding the issues that should be heard at the Hearing. On July 26, 2004, the Board notified the Parties of the issues that would be heard at the Hearing. The Board determined the issues that will be considered at the Hearing are:

1. What effect will the new design of the haul road have on the movement and migration of wildlife in the area?
2. What effect will the new design of the haul road have on public access to the wilderness areas and tourist sites on either side of the haul road?
3. What effect will the new design of the haul road have on the local watershed?
4. What effect will the new design of the haul road have on the noise and dust coming from the haul road?
5. What is the legal status of the approval given that pre-development activities under the previous approval were to be commenced by December 31, 2001 unless amended?

Corporation; and the Alberta Council for Sustainable Communities and the Environment (collectively, the “Intervenors”) between August 20 and 31, 2004.

[10] On September 1, 2004, the Board offered the Parties an opportunity to comment on the intervenor requests. The Board received the Parties’ comments on September 7, 2004.

[11] On September 1, 2004, the Board received a request from the Approval Holder to stay the Board’s process until such time as the application commenced in the Federal Court of Canada is adjudicated upon. According to the Approval Holder, the Board could lose jurisdiction if the Federal Court determines an environmental assessment under CEAA is required. Also, the Approval Holder stated it may be prejudiced if the Board’s proceedings are not stayed as information obtained in the Hearing may be detrimental to the Approval Holder’s position in respect to the Federal Court application. The Board received comments regarding the stay request from the Appellant and the Director on September 3, 2004. On September 9, 2004, the Board notified the Parties it was denying the Approval Holder’s request for a stay of the proceedings.

[12] On September 9, 2004, the Board notified the Parties that the Cadomin Residents would be granted full party status. The Board also advised Trout Unlimited, Yellowhead County, the Alberta Fish and Game Association, the United Mine Workers of America, the Town of Hinton, the West Yellowhead Community Futures Development Corporation, and the Alberta Council for Sustainable Communities and the Environment would have limited intervenor status. Finally, the Board advised that the intervenor request of Mr. Tom Stang was denied.

[13] The following are the Board’s reasons.

[14] On September 14, 2004, the Board received a request for reconsideration from Mr. Tom Strang, stating that as one of the issues set by the Board was public access, as a member of the public he should be entitled to participate in the hearing. On September 15, 2004, the Board denied the reconsideration request indicating that:

“The Board is of the view that your concerns regarding access to the wilderness area and tourist sites on either side of the haul road are the same concerns as the Appellant, Mr. Gadd and will be dealt with by the Appellant at the Hearing. The

Board notes that in this regard, Ms. Klimek intends to call you as a witness on behalf of Mr. Gadd.”

II. SUBMISSIONS

A. Intervenors

1. Mr. Allan Dane, Ms. Barb Higgins, Ms. Helen Ready, Ms. Janice Melnychuk, Mr. Ed Vass, Ms. Joyce Wilkins, and Mr. Roger Wilkins (the “Cadomin Residents”)

[15] The Cadomin Residents explained that all of the individual members own property and are part-time residents of the Hamlet of Cadomin, and they support the Appellant in opposing the Haul Road. The Cadomin Residents stated that the Haul Road comes within approximately 1000 metres of Cadomin. They stated that they use the Grave Flat Roads, a public municipal road, which the Haul Road will abut, and they use the recreational areas near the Haul Road.

[16] The Cadomin Residents argued they would be affected by the air, noise, and light pollution caused by the Haul Road, as well as by the loss of access to recreational areas they traditionally favoured to the southwest of Cadomin. They expressed concern regarding the effect of the Haul Road on the wildlife that use the McLeod River Valley corridor.

[17] The Cadomin Residents stated they would bring a different perspective and different evidence to the hearing than the Appellant. They stated they have long experience with the effects of mining operations in the vicinity and have detailed knowledge of the local conditions. They explained their evidence would focus on the local issues impacting them.

[18] With respect to the noise issue, the Cadomin Residents expressed concerns regarding the validity of the noise assessment prepared by the Approval Holder in support of the application. They argued the AEUB noise guideline was misapplied with respect to permissible sound levels, as no adjustment was made for the ambient sound level. The Cadomin Residents stated they would be exposed to sound spikes approximately 24 decibels over ambient levels about every six minutes, which may cause discomfort to the residents. They submitted the noise assessment overestimates the existing noise and underestimates the impact of the Haul Road, and the Director has required no mitigation.

[19] On the issue of air quality, the Cadomin Residents expressed concern regarding the increase of PM_{2.5} since it has the greatest potential health effects. They submitted trucks on the Haul Road will generate significant dust, and the predominate westerly winds will funnel the dust and other pollution into Cadomin. They stated PM_{2.5} levels have not been measured in Cadomin, and the Haul Road has not been assessed for its impact on the formation of primary and secondary PM_{2.5}.

[20] The Cadomin Residents stated the design of the Haul Road has been altered from the application submitted to the Director. They explained the "...haul road appears to hug the west side of the Grave Flats Road and will create a barrier for access to the lands to the west which the Applicants [(the Cadomin Residents)] had previously accessed from the Grave Flats Road..."³ They argued dust, noise, and light pollution from the trucks will make use of the Grave Flats Road hazardous and unpleasant, "...causing a *de facto* restriction on access."⁴

[21] The Cadomin Residents argued the Director did not carefully consider the issues of public safety, air quality, noise, and other environmental effects, and he did not assess alternatives to transport coal between the Cheviot and Luscar mines, including overland conveyor or rail shuttle.

2. Trout Unlimited

[22] Trout Unlimited stated it was "...primarily concerned with any disturbance that may have a deleterious effect on the fish bearing McLeod River and its tributaries."⁵ It explained it would take part in the hearing to ensure the ecological integrity of the watershed and the species it possesses is maintained. Trout Unlimited stated its goal is to "...see that any crossings constructed are built to allow fish passage in high and low water conditions and all measures are taken to prevent any unnecessary sedimentation from occurring on the McLeod River."⁶

³ Cadomin Residents submission, dated August 20, 2004.

⁴ Cadomin Residents submission, dated August 20, 2004.

⁵ Trout Unlimited's submission, dated August 27, 2004.

⁶ Trout Unlimited's submission, dated August 27, 2004.

3. Yellowhead County

[23] The Yellowhead County stated it supported the Cheviot project, as it contributes substantially to the economic viability of the region and it utilizes the local work force and businesses.⁷

4. Alberta Fish and Game Association

[24] The Alberta Fish and Game Association stated it has concerns regarding the project, "...specifically concerning fisheries and the watershed; movement and migration of wildlife; public access to areas around the haul road; and the impact of dust and noise from the haul road."⁸ It explained it represents a broad spectrum of Albertans.

5. United Mine Workers of America

[25] The United Mine Workers of America explained it represents employees at Cardinal River mines and the Cheviot mine project. It stated it is in favour of the project proceeding without any further delay and all appeals against the Haul Road and project should be dismissed.⁹

6. Mr. Tom Stang

[26] Mr. Tom Stang argued the Haul Road project would directly affect his and his family's comfortable use and enjoyment of the area and the things that attract them to the area, such as the scenery, the peaceful surroundings, and the sense of stepping back into time. He stated he has been a visitor to the area for the past 20 years. He explained he was sickened and disgusted at what he saw was happening to the valley. He argued the route of the Haul Road is wrong and should never have been considered, and the Haul Road would put an end to any chance of developing the tourism industry in the area.

⁷ Yellowhead County's submission, dated August 26, 2004.

⁸ Alberta Fish and Game Association's submission, dated August 31, 2004.

⁹ The United Mine Workers of America's submission, dated August 31, 2004.

[27] Mr. Stang stated the Haul Road will have an adverse effect on the Hamlet of Cadomin, Cadomin caves, Whitehorse Creek Provincial Recreation area, the McLeod River Valley and Canyon, the historic train tracks, the McLeod River headwaters, Prospect Creek, Carrot Creek, animal migration and nesting, noise and dust in the area, and visitors to the area.

[28] Mr. Stang explained the Haul Road affected his decision not to buy a bed and breakfast establishment in Cadomin. He questioned how a person could run a tourism-orientated business in an area where visitors will not want to come.

[29] Mr. Stang submitted that his "...years of visitation to the area qualify me to make such a submission to the Board, not only for myself, but for the thousands of others like me and thousands of other people who may visit this beautiful area in the future."¹⁰

7. Town of Hinton

[30] The Town of Hinton stated it favours the continued development of the Haul Road, and it needs some certainty that responsible coal mining continues as part of the area's future. It stated it represents 10,000 people who are directly affected by the social, environmental, and economic aspects of the Haul Road and the Cheviot project.

[31] The Town of Hinton stated the "...haul road has been communicated, discussed, and understood within the community for some period of time."¹¹ It expressed its confidence in the Approval Holder and its employees to be environmentally responsible in the construction, operation, and reclamation of the Haul Road. It respected the regulators' abilities to monitor and address concerns of physical industrial activity on Crown land.

[32] The Town of Hinton explained the Councillors had the opportunity to tour the Haul Road, and it appreciated the efforts being made "...to ensure this haul road is responsibly developed in what is clearly a challenging area. The public's overall best interests are being addressed to the satisfaction of Hinton Council."¹²

¹⁰ Mr. Tom Stang's submission, dated August 30, 2004.

¹¹ Town of Hinton's submission, dated August 27, 2004.

¹² Town of Hinton's submission, dated August 27, 2004.

8. West Yellowhead Community Futures Development Corporation

[33] The West Yellowhead Community Futures Development Corporation stated it supported and endorsed the project. It stated the Approval Holder is a stellar steward of the environment and a good corporate citizen, and it contributes to the economic base of Edson, Hinton, Cadomin, and Robb through the employment it creates and the spin off jobs.¹³

9. Alberta Council for Sustainable Communities and the Environment

[34] The Alberta Council for Sustainable Communities and the Environment explained it is a community based "...coalition of Albertans whose common goal is to protect resource based economies and the environment." It stated it represents 1,100 people and businesses throughout Alberta. It stated it favoured the project.¹⁴

B. Appellant

[35] The Appellant stated the intervenor requests of the Cadomin Residents, Mr. Tom Stang, the Alberta Fish and Game Association, and Trout Unlimited should be allowed. He submitted that these requests demonstrated they are affected by the environmental impacts of the Cheviot project, and they intend to address the issues established by the Board. He stated these intervenors have information and evidence that would assist the Board.

[36] The Appellant submitted these intervenors should be allowed to present evidence, cross-examine witnesses adverse in interest, and present arguments.

[37] The Appellant stated it was his understanding the Yellowhead County and the West Yellowhead Community Futures Development Corporation had stated their position and did not want to intervene in the hearing. He argued their statements did not address the issues outlined by the Board, and their letters should be disregarded.

[38] The Appellant argued the Alberta Council for Sustainable Communities and the Environment, the Town of Hinton, and the United Mine Workers of America should not be allowed to intervene, as they intend to primarily address the economic benefits of the project. He

¹³ West Yellowhead Community Futures Development Corporation's submission, dated August 25, 2004.

stated economics is not an issue before the Board and therefore, their interventions would be of no assistance. The Appellant submitted that, if these applicants are allowed to intervene, their involvement must be limited to the environmental effects and issues set out by the Board.¹⁵

C. Approval Holder

[39] The Approval Holder submitted any person granted intervenor status may only be entitled to give representations to the Board and may not conduct cross-examination of any witnesses of the Parties. It argued allowing intervenors to conduct cross-examinations of the Parties would defeat the scheme created by section 91(1) of EPEA and the procedural safeguards contained therein, and there are no provisions in the legislation that allows the Board to grant intervenors the right to cross-examine the Parties. It argued the procedural safeguards, including the requirement of filing a statement of concern and filing a notice of appeal within specified time limits, would "...become meaningless if a person can, once a hearing has been set, rely on s. 7(2)(c) of the Regulation to obtain the same rights at a hearing as those granted to a person who files a valid notice of appeal based on a statement of concern pursuant to s. 91 of EPEA."¹⁶

[40] The Approval Holder submitted, keeping "...the above in mind... we do not object to any of the persons requesting intervenor status being granted that status on the condition that their participation in the hearing is limited to giving the Board a five to fifteen minute presentation."¹⁷ It stated the Intervenor should be required to file written materials, such as will say statements or a copy of the presentation, and they should be required to comply with the deadlines set for the Appellant. The Approval Holder argued that if any Intervenor misses the deadline, they should not be allowed to present at the hearing.

¹⁴ Alberta Council for Sustainable Communities and the Environment's submission, dated August 31, 2004.

¹⁵ See: Appellant's submission, dated September 7, 2004.

¹⁶ Approval Holder's submission, dated September 7, 2004.

¹⁷ Approval Holder's submission, dated September 7, 2004.

D. Director

[41] The Director opposed the acceptance of the intervenor request by the Cadomin Residents, as these individuals had the opportunity to respond to the public notice of the application and provide comments to the Director in the review process.¹⁸

[42] The Director submitted the remaining intervenor requests "...either a) only provide generic comments on the Cheviot Coal Project, or b) do not indicate how the intervention will present information that will be different from parties on the specific appeal issues."¹⁹ The Director argued none of the intervention requests should be granted due to the limited time arranged for the hearing.

[43] The Director recommended that, if the Board determines any of the requests are warranted, then only written statements should be allowed, and the statements should be provided prior to the hearing to allow the Parties to respond and to prevent the hearing process from being impeded by receiving evidence or information for the first time at the hearing.

III. DISCUSSION

A. Legislation

[44] Under section 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (the "Act" or "EPEA") the Board can determine who can make representations before it. Section 95(6) states:

"Subject to subsection (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations."

[45] Pursuant to sections 7 and 9 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the "Regulation"), the Board must determine whether a person submitting a request to make submissions should be allowed to do so at the hearing. Section 7 of the Regulation states:

¹⁸ Director's submission, dated August 30, 2004.

¹⁹ Director's submission, dated September 7, 2004.

“7(2) A published notice referred to in subsection (1)(a)(ii) or (b)(ii) must contain the following:

- (a) the date, time and place of the hearing, in a case where an oral hearing is to be held;
- (b) a summary of the subject matter of the notice of appeal;
- (c) a statement that any person who is not a party to the appeal and wishes to make representations on the subject matter of the notice of appeal must submit a request in writing to the Board;
- (d) the deadline for submitting a request in writing under clause (c);
- (e) the mailing address of the Board;
- (f) the location and time at which filed material with the Board will be available for examination by interested persons.”

[46] Section 9 of the Regulation provides:

- “(1) A request in writing referred to in section 7(2)(c) shall
- (a) contain the name, address and telephone number of the person submitting the request,
 - (b) indicate whether the person submitting the request intends to be represented by a lawyer or other agent and, if so the name of the lawyer or other agent,
 - (c) contain a summary of the nature of the person’s interest in the subject matter of the notice of appeal, and
 - (d) be signed by the person submitting the request.
- (2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject of the notice of appeal and shall give the person written notice of that decision.
- (3) In a notice under subsection (2) the Board shall specify whether the person submitting the request may make the representations orally or by means of a written submission.”

[47] In the Regulation, it also states that the Board can determine who will be a party to an appeal. Section 1(f)(iii) of the Regulation states: “In this Regulation... ‘party’ means any other person the Board decides should be a party to the appeal.”

[48] The test for determining intervenor status is stated in the Board’s Rules of Practice. Rule 14 states:

“As a general rule, those persons or groups wishing to intervene must meet the following tests:

- their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;
- the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
- the intervention will not repeat or duplicate evidence presented by other parties....”

The Board’s Rule of Practice are authorized by section 95(8) of EPEA, which provides: “Subject to the regulations, the Board may establish its own rules and procedures for dealing with matters before it.” In applying these provisions the Board is guided by the discussion in *Macaulay Practice and Procedure Before Administrative Tribunals* where it states:

“...[S]ubject to certain limitations which will be discussed below, an administrative agency is ‘master of its own procedure’. Some statutes expressly grant the agency a general power over procedure. Even in the absence of an express grant of authority to that effect, the authority is implied in the grant of the agency’s mandate. The authority to develop the necessary procedure to effect a mandate is implicit in the grant of that mandate. What this means is that an agency is free to develop its procedures as required in order to accomplish its particular purpose.”²⁰

The Board is also guided by Lord Loreburn in the *Board of Education v. Rice* where he states:

“The Board of Education will have to ascertain the law and also ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both side[s], for that is a duty lying upon everyone who decides anything. ... They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. Provided this is done, there is no appeal from the determination of the Board.”²¹

B. Mr. Allan Dane, Ms. Barb Higgins, Ms. Helen Ready, Ms. Janice Melnychuk, Mr. Ed Vass, Ms. Joyce Wilkins, and Mr. Roger Wilkins

²⁰ Robert W. Macaulay and James L.H. Sprague, *Macaulay Practice and Procedure Before Administrative Tribunals* (Toronto: Carswell, 2004) at page 9-1.

²¹ *Board of Education v. Rice*, [1911] A.C. 179 (H.L.).

[49] In determining whether an individual or group should be allowed the opportunity to participate as intervenors, the Board must look at how the evidence or information provided by potential intervenors will materially assist the Board in carrying out the function. What the Board tries to avoid is evidence that only repeats what is expected the Parties will present.

[50] The purpose of the Board in a case such as this is to prepare a Report and Recommendations to the Minister, recommending to the Minister whether the approvals under appeal should be confirmed reversed or varied.²² As the Director has repeatedly argued before the Board, the purpose of the Board is “build a better approval”, and as such the Board always seeks the best and most complete evidence possible to assist it in making its decisions. In carrying out this function, the Board has regard for the purposes of EPEA and the *Water Act* found in section 2 of both acts.²³ Key concepts within these purposes is the public interest, public involvement

²² Section 99(1) of EPEA provides:

“In the case of a notice of appeal referred to in section 91(1)(a) to (m) of this Act or in section 115(1)(a) to (i), (k), (m) to (p) and (r) of the *Water Act*, the Board shall within 30 days after the completion of the hearing of the appeal submit a report to the Minister, including its recommendations and the representations or a summary of the representations made to it.”

Section 100(1)(a) of EPEA provides:

“On receiving a report of the Board, the Minister may, by order, (a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make....”

²³ Section 2 of EPEA provides:

“The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
- (b) 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;
- (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
- (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
- (e) the need for Government leadership in areas of environmental research, technology and protection standards;
- (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
- (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;
- (h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;
- (i) the responsibility of polluters to pay for the costs of their actions;

and a shared responsibility of all Albertan's to protect the environment, including our water resources. In keeping with this concept, the Board is of the view that it is appropriate to include the Cadomin Residents as intervenors in these appeals.

[51] In making this decision, the Board is guided by Mr. Justice Estey in *Innisfil (Township) v. Vespa (Township)* where he discussed the type of procedures that should be followed by a tribunal carrying out a public interest function, such as the Board in this case, compared to a tribunal merely addressing a dispute between two parties. Justice Estey stated:

“Where, on the other hand, the Board, by its legislative mandate or the nature of the subject-matter assigned to its administration, is more concerned with community interests at large, and with technical policy aspects of a specialized subject, one cannot expect the tribunal to function in the manner of the traditional Court. This is particularly so where Board membership is drawn partly or entirely from persons experienced or trained in the sector of activity consigned to the administrative supervision of the Board.”²⁴

[52] The Cadomin Residents live within 1000 metres of the Haul Road. It appears a number of them have lived in the area for some time, as they have experience relating to the effects of the mining operations in the area. There is no doubt they have a tangible interest in the matters under appeal, and the Cadomin Residents have the greatest potential of being affected by the project. However, what is most significant for the Board is that because of this interest and experience, the Board is of the view that the Cadomin Residents will have evidence that will be of assistance to the Board in carrying its mandate under *EPEA* and the *Water Act*.

(j) the important role of comprehensive and responsive action in administering this Act.”

Section 2 of the *Water Act* provides:

“The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
- (b) the need for Alberta's economic growth and prosperity;
- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
- (d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
- (e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;
- (f) the important role of comprehensive and responsive action in administering this Act.”

²⁴ *Innisfil (Township) v. Vespa (Township)*, [1981] 2 S.C.R. 145, 123 D.L.R.(3d) 530 (S.C.C.).

[53] The Approval Holder has suggested that because it is possible that the Cadomin Residents likely had the right to file a statement of concern and their own notices of appeal that this should prevent them from participating fully, and particularly cross-examining, at the hearing. The Director similarly suggests that the Cadomin Residents should not be permitted to intervene because they had an opportunity to respond to the public notice for the project and provide comments to the Director as part of the review process. While the Board is uncertain as to why these individuals did not file their own Notice of Appeal, the ability to file a statement of concern and notice of appeal in no way limits the ability of a person or group to intervene. Similarly, previous participation in the Director's review process does not limit the ability of a person or group to intervene. Given that a prerequisite to filing a statement of concern and a notice of appeal, and being able to participate fully in the Director's review process for that matter, is being directly affected, the consequence of accepting these arguments is that the only people or groups that would be entitled to intervene would not be directly affected. This is not consistent with the express provisions of the acts, the purposes of the acts and the principles of sound decision-making.

[54] The experiences of the Cadomin Residents will provide the Board with a different viewpoint and additional information that the Appellant would not be able to provide. The Appellant's interest in the area is essentially economic in nature (as are many of the other Intervenor requests). Based on the Intervenor request provided, the Cadomin Residents will be presenting evidence that is directly relevant to the matters included in the appeals before the Board. The issues raised by the Cadomin Residents relate to dust and noise resulting from the Haul Road, and the effects on wildlife and public access to the wilderness areas. These matters fall within the four corners of the identified issues. They will not be permitted to advance arguments beyond the issues set by the Board.

[55] The Cadomin Residents stated their intention is to work with the Appellant to ensure the evidence presented is not repetitive or duplicative. This will streamline the hearing process and will prevent any undue delay.

[56] The Board has the right to determine the extent of an intervenor's participation on the hearing. Section 9 of the Regulations provides:

- “(2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject matter of the notice of appeal and shall give the person written notice of that decision.
- (3) In a notice under subsection (2) the Board shall specify whether the person submitting the request may make the representations orally or by means of a written submission.”

[57] The Board has the option of allowing the Intervenors to provide oral representations. The Board needs to hear from the Cadomin Residents in order to provide comprehensive recommendations to the Minister and to include all relevant information available to it. Thus, the Cadomin Residents will be given full party status for the purposes of the hearing of these issues, including the right to make opening statements, present evidence, cross-examine, and present closing arguments.

[58] The Board is authorized to grant the Cadomin Residents full party status pursuant to section 96 of EPEA, section 9 of the Regulation, and section 1 of the Regulation which authorizes the Board to grant party status to any person it decides it should be a party. Further, the ability of the Board to grant the Cadomin Residents the right to make opening statements, present evidence, cross-examine, and present closing arguments is expressly contemplated in the Board’s Rules of Practice.

[59] The Board notes that the Approval Holder has advanced a particular objection to allowing the Cadomin Residents to cross-examine. The Board’s Rules of Practice in Rules 27 and 28 address cross-examination stating, in part:

“[27] ... A witness whose testimony is presented by a sworn written statement shall be available for cross-examination, as may be required.

[28] ... Cross examination shall be limited to the scope of the direct evidence and, subject to the discretion of the Chair, shall always be limited to witnesses whose testimony is adverse to the party desiring to cross-examine. Cross-examination will be permitted to the extent necessary for full and true disclosure of the facts.”

In the Board’s view, given the nature of the interest that the Cadomin Residents have in this matter and the fact that the Board has requested a full presentation from them, the Board is of the view that the principles of fairness require that the Cadomin Residents be permitted to cross-examine the Approval Holder and the Director. The Board notes that the procedure for the

hearing will permit the Approval Holder and the Director the opportunity to cross-examine the Cadomin Residents, present evidence after the Cadomin Residents have presented their case, and also where appropriate to present evidence on re-direct upon request after the cross-examination by the Cadomin Residents. The Board does not believe that the Approval Holder will be prejudiced by this approach.

C. Trout Unlimited, Yellowhead County, Alberta Fish and Game Association, United Mine Workers of America, Town of Hinton, West Yellowhead Community Futures Development Corporation, Alberta Council for Sustainable Communities and the Environment

[60] The Board notes the issue of the Cheviot mine has been an important and public issue in the area for the past number of years for the residents. Before the Board makes its recommendations, it wants to have a clear understanding of the context in which the Haul Road is being built and the possible effect on the area.

[61] These intervenors all have a valid interest in the outcome of the Haul Road project. Some, such as the Town of Hinton and Yellowhead County, have been elected to represent the interests of their constituents and promote economic development in the area. The Board would like to hear from these officials as they may have relevant information to present concerning the impact of the project for the area.

[62] The United Mine Workers of America represents individuals with a vested interest in the project, specifically those who work at the mine site and whose livelihood could, potentially, be affected by the outcome of the Board's decision. Therefore, the Board would like to hear from them as they may have relevant information for the Board to consider.

[63] The Community Futures Development Corporation and the Alberta Council for Sustainable Communities and the Environment have an interest in the economic development of the area. These organizations can provide the Board with additional information regarding the impacts of the project on the area that may be relevant to the Board to consider.

[64] As identified by the Appellant many of interests identified in these intervenor requests were economic in nature, this does not preclude them from being intervenors. The Haul Road, and the associated coal mine, are an important issue to the community. The Board needs

to hear all aspects of the issues, and it believes these intervenors can provide additional information that may be of assist the Board in its decision.

[65] Trout Unlimited and the Fish and Game Association have a valid interest in the effects the project may have on the local watershed and the movement of animals, both identified issues in these appeals. These organizations may be able to provide relevant information regarding the possible effects on fish habitat and wildlife migration and habitat. Therefore, the Board will grant these organizations intervenor standing for the purposes of these appeals.

[66] The Board grants all of these intervenor requests. However, as many of these intervenors raised similar issues and positions, the Board will allow limited intervenor standing. These intervenors will be allowed to provide written submissions and will be allotted five minutes at the hearing to present their evidence and their evidence will be subject to cross-examination. The Board notes that the Approval Holder did not object to intervenors being allowed to participate in this way. The Board also believe that limiting the participation of these intervenors in this way also addresses the concerns of the Director.

D. Mr. Tom Stang

[67] The Board notes Mr. Tom Stang lives in Fort Saskatchewan, over 300 kilometres away from the area in which the proposed Haul Road is to be built. He stated he has visited the area for the past 20 years, and he appreciates the beauty of the area and all it has to offer visitors.

[68] Mr. Stang's intervenor request does not identify any interest that demonstrates an interest that exceeds that of all Albertans. In fact, Mr. Stang stated his request was made "...not only for myself, but for the thousands of others like me and thousands of other people who may visit this beautiful area in the future."²⁵ In the Board's view, the Appellant and the Cadomin Residents will adequately deal with the use of the area for recreational purposes and the matter of access to sites of interest to tourists.

²⁵ Mr. Tom Stang's submission, dated August 30, 2004.

IV. CONCLUSION

[69] The Board finds Mr. Allan Dane, Ms. Barb Higgins, Ms. Helen Ready, Ms. Janice Melnychuk, Mr. Ed Vass, Ms. Joyce Wilkins, and Mr. Roger Wilkins will be able to provide evidence that will assist the Board in making its recommendations. Therefore, the Board grants these individuals full party standing to present arguments to the Board, including the right to cross-examine.

[70] The Board finds Trout Unlimited, Yellowhead County, Alberta Fish and Game Association, United Mine Workers of America, the Town of Hinton, West Yellowhead Community Futures Development Corporation, and the Alberta Council for Sustainable Communities will likely be able to provide additional information to the proceedings that will supplement the evidence that will be presented by the Parties. Therefore, these organizations will be granted limited intervenor standing.

[71] The intervenor request of Mr. Tom Stang is denied. The matters raised in his intervenor request will be adequately dealt with by the Appellant and the Cadomin Residents.

Dated on October 12, 2004, at Edmonton, Alberta.

“original signed by”

Dr. Frederick C. Fisher, Q.C.
Chair